Private property rights v. total government control: The fight to reform the Montana Subdivision and Platting Act in the 53d legislative assembly

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The University of Montana
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Date: 9/22/94
PRIVATE PROPERTY RIGHTS v. TOTAL GOVERNMENT CONTROL:
THE FIGHT TO REFORM
THE MONTANA SUBDIVISION AND PLATTING ACT
IN THE 53d LEGISLATIVE ASSEMBLY

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Approved by

Chairperson, Board of Examiners

Dean, Graduate School

Date
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Finally, this paper is dedicated to my best friend and wife, Julie. She left behind her classroom to chase a dream with me. Things didn’t always go as planned, but her unwavering faith in me provided strength when I had none. This paper is as much hers as it is mine. Thanks Jules.
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Chapter 1
Introduction

One of the most hotly contested issues in the biennial meetings of the Montana Legislature is reform of Montana’s subdivision law. With battle lines drawn along the principles of private property rights versus government regulation, the issue has always provoked a spirited fight. Since subdivision law regulates the way in which land can be developed, it is viewed by many as the most important piece of environmental legislation on the state level. Yet in twenty years, the law has not been changed.

My interest in subdivision reform began in 1991. For a class, “Environmental Legislation”, I chose the issue of subdivision reform to follow and document through the ‘91 session. Having worked for two years in the real estate industry, I had a basic understanding of terminology and the viewpoint of having worked with such regulations. As I was also contemplating a master’s thesis on the subject of private land conservation, I thought this would be a useful place to start. Little did I realize how deep my involvement in subdivision reform would become or that one day it would be the central subject of my professional paper, rather than an interesting corollary to it.

This paper focuses on the latest effort to reform the subdivision law. It begins with an explanation of why the law doesn’t work and its consequences for the state. The paper progresses with a look at the legislative history of the law, tracking the attempts to reform the law since its inception in 1973.

The paper proceeds with an examination of the Montana Audubon subdivision project, a topic that became my life for five months. In anticipation of
the 1993 legislative session, Audubon raised the funding to hire a coordinator to gather information and implement a campaign for reform. I was hired as the coordinator, and this paper is as much a recounting of my experience as anything else.

The paper will provide an inside look at the legislative process in the State of Montana, taking the reader inside the session. The reader will watch the political maneuvering that narrows a field of six draft bills into the single bill that survived and was signed into law.

Finally, the session is analyzed from the perspective of someone who, until recently, never experienced the political process up close. What was effective and what wasn’t? More importantly, what can be useful for the future? It is my hope that the reader will gain an appreciation of how grass roots groups can influence the legislative process, especially in a state like Montana, where the small population affords individuals a great deal of access to their elected officials.

I. Why The Law Doesn’t Work

The Montana Subdivision and Platting Act\(^1\) went on the books in 1973. Its original intent was to regulate the division of land in order to prevent overcrowding, lessen congestion on streets and highways, provide adequate amenities for buyers and to require development in harmony with the natural environment (MCA 76-3-102). To achieve these goals, the law required that divisions of land be reviewed by a local review authority and accepted or rejected based on the following criteria: the need for the subdivision, expressed public opinion about the subdivision, its effects on agriculture, local services,

taxation, the natural environment, wildlife and wildlife habitat as well as its impact on public safety (MCA 76-3-608).

At the time of passage it seemed like a good piece of legislation that would protect Montana from the problems of rapid growth that were plaguing other western states like Colorado and California.

It soon became apparent however, that the law wasn't accomplishing its purpose because of three gaping loopholes.

1) The law defined a subdivision as any division of land that creates a parcel of less than 20 acres (MCA 76-3-103). This meant that land divisions 20 acres or larger were not reviewed.

2) The law exempted occasional sales (MCA 76-3-207), which it defined as one sale of a division of land in any twelve month period.

3) The law exempted family conveyances(MCA 76-3-207), which it defined as divisions of land made for the purpose of gift or sale to an immediate family member.

Because of these three loopholes, approximately 90% of the land divisions that have occurred in the state since 1973 have not been reviewed. To understand what that means in terms of acreage consider this fact: of the 134,200 acres that have been divided in Missoula County since 1973, 123,369 acres were not reviewed. The figures are similar for Gallatin, Flathead and Lake Counties (figure 1-1). The loopholes in the law have clearly been abused. The result of all of this unreviewed development has been a myriad of economic, social and environmental problems. As the reputation of Montana's natural splendor spreads around the nation, historic, scenic and ecologically significant lands are being divided into 20-acre parcels and sold.
To illustrate the way these loopholes are used together to avoid review and subvert the original intent of the law, let us look at a hypothetical example. A person with a 300-acre property divides it and sells a 100 acre parcel to a developer (figure 1-2). The division would be not reviewed due to the definition of subdivision. The developer immediately divides it into five 20-acre parcels and sells them (figure 1-3). This division is also not reviewed due to the definition of subdivision. One parcel is bought by a man who divides it and sells 10 acres to his son. This division is not reviewed because it is a family conveyance. Both then sell 5-acre parcels to raise money to build houses (figure 1-4). Both of these divisions are exempt from review because they are occasional sales. The result is a de facto subdivision with nine landowners where before there was only one.
Unreviewed Land Division v. Reviewed Land Division Since 1973

<table>
<thead>
<tr>
<th>County</th>
<th>Reviewed Acreage</th>
<th>Unreviewed Acreage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Flathead</td>
<td>113,418*</td>
<td>26,997*</td>
</tr>
<tr>
<td>Gallatin</td>
<td>117,831*</td>
<td>20%</td>
</tr>
<tr>
<td>Lake</td>
<td>134,200*</td>
<td>8%</td>
</tr>
<tr>
<td>Missoula</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*Represents total acreage divided as of October 1992

Source: Missoula, Flathead, Gallatin and Lake County Planning Offices
Original 300 acre tract divided into 200 acre tract and 100 acre tract. No Review due to twenty acre definition.

Figure 1-2
100 acre tract divided into five 20 acre tracts.
No review due to twenty acre definition.
20 acre tract divided into two 10 acre tracts.
No review due to family conveyance.

10 acre tract divided into two 5 acre tracts.
No review due to occasional sale.

Figure 1-4
II. The Problems of Unregulated Development

a. Problems for Wildlife

The most popular areas for development are along rivers and streams, in fertile valleys bottoms and in the foothills. Unfortunately, these are the areas that support the greatest diversity of flora and fauna. Development in these areas can destroy habitat and permanently alter the ecosystem. Riparian areas are being cleared; winter ranges for large animals such as deer and antelope are being fenced off, and wildlife corridors, important for seasonal migration, are obstructed.²

People move to the country in order to get closer to nature. But when nature proves not as civilized as the city, they get upset. The number of human—wildlife conflicts are skyrocketing.² Twenty-acre development greatly exacerbates these problems because it unnecessarily spreads people and their impacts over a larger area rather than clustering them together. Without a natural buffer zone between humans and wildlife, the likelihood of conflict increases. All of this places pressure on wildlife that are already being hammered on public lands.

The Department of Fish Wildlife and Parks (FWP) finds itself spending increased staff time and money responding to complaints about nuisance wildlife which takes resources away from much more important tasks.³ They have an animal damage control fund paid for by hunting licenses that was originally intended to reimburse farmers for crops damaged by wildlife. The bulk of that

⁴Ibid.
fund is now used to respond to nuisance animal complaints. The irony of this fact is hunters are losing hunting lands to 20-acre development.

b. Problems for Agriculture

People moving into rural areas often don't appreciate the realities of life in an agricultural setting which can cause headaches for farmers and ranchers that are trying to stay in business. These new rural residents often don't realize that they have a fence maintenance obligation and then complain when they find livestock in their yard. They don't understand their responsibility for noxious weed control which negates the best efforts of a neighboring landowner. They complain about noise, odors and hours of operation and they bring pets that often harass or kill livestock.

To make matters worse, farmers and ranchers are losing their traditional way of life. As farm land is converted to recreational and residential uses, the support systems that agricultural families depend on disintegrate. The makeup of the community is forever changed, increasing the hardship of those who want to continue working the land.

In Jefferson county, ranchers stood by and watched as land all around them fell under the 20-acre scalpel. Finally, an entire section (i.e., 640 acres) of prime grassland went up for sale and was bought by two land development companies. The section was completely surrounded by private lands with no public access. The first notice the surrounding landowners received of the developers' intent to divide the land was a letter from their attorneys threatening a lawsuit if they did not grant access. At last the ranchers were galvanized into action. In September of 1992, they successfully petitioned the county commissioners for an emergency zoning ordinance that restricted non-farm and
non-ranch homes to one for every 640 acres\(^5\). It also banned any further subdivision or residential development. While the measure was able to suspend the immediate threat of development, it is only a temporary one. In order for the zoning to become permanent, the county would have to mount a county-wide planning effort, something the county isn’t sure it can fund to completion.

c. Problems for Counties

Ask a county official what the biggest hassle of unreviewed development is and they’re sure to tell you poorly designed roads. When there is no review, there is no requirement that roads be built to county standards. The results are hazardous roads that can be difficult to drive in the best of conditions and impassable in bad weather. Developers of unreviewed subdivisions frequently don’t fulfill road maintenance obligations. When the situation gets bad enough, residents who use the road demand that local government assume responsibility. If the government does, it is usually with taxpayer’s money.

In Gallatin County, $150,000 was spent to improve a 13 mile dirt road leading to an unreviewed subdivision. The county spends another $15,000 a year maintaining that road. And this example is not the exception. As of January 1993, Sam Gianfrancisco, the Road Supervisor for Gallatin County, noted 170 miles of dirt roads related to unreviewed development that the county has been asked to maintain\(^6\).

Road maintenance isn't the only demand made by residents of unreviewed subdivisions. They often want fire protection, police protection, school bus service and other public amenities. Unfortunately, they aren't paying their fare share in taxes. Twenty-acre parcels are taxed as agricultural land which

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yields considerably less revenue than residential land. In addition, improvements on agricultural land are only taxed at 80% of market value. Tax breaks for legitimate agricultural lands are necessary due to the small profit margin inherent to agriculture, but most 20-acre development isn't for agricultural purposes. According to Jim Fairbanks of the Missoula County Appraiser's Office, an unimproved 20-acre tract in Missoula County would yield about $10 in taxes. If taxed as residential, the same tract would yield over $300. When considered on a county-wide basis, the difference in tax revenue can be substantial. In Park County there are 1,560 20-acre tracts that contribute $9,500 to the tax base. If taxed as residential tracts they would contribute over $300,000.

Custer County has an unreviewed 20-acre development that was advertised nationally and targeted towards low income people. Many families sold everything they had and moved to Montana with the dream of a new life. When they arrived, they quickly learned that the city skills were of little value in such a rural area. Now at least 30 of them are stuck in Miles City and living on welfare. Since Custer County is responsible for welfare payments, it has placed an enormous burden on its resources. The County offers one way bus tickets out of town for those lucky enough to have someplace to go.

All of this undermines a county's ability to do planning and to regulate growth so that it is a net gain rather than a net loss. How can a local government do any meaningful planning for the future, when development occurs in a scatter shot fashion?

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7 Al Knauber, "Park County Carved into 20-acre Tracts From One End to the Other," Livingston Enterprise, 3 April 1991.
8 Donna Healy and Jill Sundby, "Dream Can Have Its Drawbacks," Billings Gazette, 16 August 1992, 7E.
d. Problems for Buyers

"Caveat Emptor" should be the new motto on Montana's state seal. The review process is the only means of disclosure in a land division. Without it, there is no sure way for a buyer to know what hidden defects a property might contain. People buying unreviewed property often find that they didn't get all they paid for. There may not be a utility easement, or potable water on the property. There may be terrible roads to the property or in some cases, no road at all. There may be unstable soils which can preclude construction or inadequate drain fields for septic tanks. Some buyers have found that the property they bought doesn't even have suitable building sites.

According to Hugh Osborne, a Flathead County Planner, one developer carved a tract of land on the Flathead River into twelve 20-acre tracts. All but two were within the 100-year flood plane where Montana law prohibits the building of any permanent structures. The review process would require that the flood plain be clearly shown on the plat map. Since these divisions weren't reviewed, the people who buy these tracts may not learn they are within the flood plain until they are denied a building permit. Small surprises such as these dramatically increase the cost of building a house or make it altogether impossible.

The very nature of 20-acre development lends itself to misrepresentation since it is often borne of the desire to evade the subdivision law. The largest land dividers do a great deal of business selling land sight unseen to out of state buyers. One company, Yellowstone Basin Properties, is a subsidiary of the Patten Corporation based in Vermont. In 1989, Patten was investigated by the attorneys general of Vermont, Maine, New Hampshire, New York and Massachusetts for

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deceptive advertising practices that allegedly violated consumer protection laws\textsuperscript{11}. The Corporation settled out of court with each state. Two years later (March 31, 1991), the CBS news program "60-minutes" aired an expose of Patten which focused on Yellowstone Basin Properties. Using a concealed camera and posing as a prospective buyer, the reporter videotaped a company salesperson being less than honest about a parcel of land at their Hidden Springs Ranch located north of Billings\textsuperscript{12}.

New Jersey resident Laetitia Monroe answered an advertisement in a local newspaper enticing her to "own a piece of paradise." The ad was placed by Rocky Mountain Timberlands, a company based in Bozeman. Wanting a place for her sons to fish, she bought a 20-acre parcel next to Silverbow Creek which the salesperson promised her was famous for its trout fishing. In September of '92 she received a letter from the Environmental Protection Agency (EPA) inviting her to a Superfund meeting. Perplexed, she called the EPA in Butte and was horrified to learn of three Superfund sites in close proximity to her property. While she was relieved that there were no hazardous materials (and thus no liability) associated with her property, she was angered to discover that Silverbow Creek is sterile due to contamination with heavy metals. There have not been fish in the creek for many years and probably won't be for many more. She still hopes to build on the property but is waiting for the results of ground water testing before making any further investments. Rocky Mountain Timberlands has denied ever making any statements regarding the quality of fishing in Silverbow Creek, but has offered Ms. Monroe the option of exchanging her property for another piece of property\textsuperscript{13}.

\textsuperscript{12}"60 Minutes' Segment Spurs Heated Confrontation," \textit{Great Falls Tribune}, 2 April 1991.
\textsuperscript{13}Ms. Laetitia Monroe, telephone interview by author, Helena, Montana, 12 January 1991.
e. Problems of Safety

Unreviewed subdivisions have even caused problems in emergency situations. Rural firefighters and emergency medical technicians complain of roads that are too steep, too narrow, too muddy or otherwise just too dangerous for them to drive their emergency vehicles on. They encounter roads with no names or roads that don't exist on a map. If the road has a name, there is often no sign or if there is a sign it is a duplicate road name. Obviously such conditions make it impossible to respond to emergency calls in a timely manner.

It isn't difficult to see how all of these problems affect all of us in some way. What is difficult to see is how a subdivision law that encourages all of this has remained on the books for so long. Adequate review could eliminate or at least mitigate most of these problems.

In the next chapter we will examine how the law came into being and the efforts to change the law in every legislative session from 1973 to the present.
Chapter 2
The Legislative History of Subdivision Reform

In 1972, the Montana Constitutional Convention guaranteed every citizen of the state the inalienable right to a "clean and healthful environment". The 1973 legislature took those words to heart and, in perhaps the most progressive era of politics in state history, passed some of Montana's most important environmental laws. The Nongame and Endangered Species Act and the Montana Major Facility Siting Act were both a product of that 43rd legislative assembly.

This was also the session in which the Montana Subdivision and Platting Act (MSPA) came into being. A 1974 report from the Montana Department of Governmental Relations notes that the MSPA was "enacted . . . in response to a growing public concern for the rapid and largely unregulated subdivision of Montana land for speculative, recreational and residential purposes." The report went on to state "The act had two primary objectives—to avoid environmental, social and economic costs of haphazard land development and to improve the accuracy of public land records."

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1 Montana Constitution (1972), art. 2, sec. 3.
5 Ibid.
There have been many changes to the MSPA in the last twenty years. This legislative history begins with the initial incarnation of the Act in the 1973 legislative session.\(^6\)

1973

*Democrat Majority in House and Senate*

The Montana Subdivision and Platting Act began life as Senate Bill (SB) 208 in the 43d legislative assembly. Introduced by Sen. Jean Turnage (R–Polson) and referred to the Senate Natural Resources Committee, the original bill defined subdivision as any division of land less than 40 acres. It did not include a family conveyance exemption or an occasional sale exemption. The acreage definition was amended down to 10 acres and the bill passed from Senate to House.

In the House, it was referred first to the Local Government Committee and then moved to the Judiciary Committee. The House amended the acreage definition back to 40 acres and added the family conveyance exemption. The bill was returned to the Senate which failed to concur in the amendments. A conference committee was set up but was not able to finish work on the bill during the regular session (Jan. 1–Mar. 10). The committee compromised by keeping the family conveyance exemption and returning the acreage definition to ten acres. Senate Bill 208 passed during special session (Mar. 12–24) and was signed into law on April 2, 1973\(^7\).

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\(^6\)The subdivision law is complex. Aspects such as the review process, park land dedication requirements, and the legal definitions of such things as dwelling units and plat maps—while important—are not the focus of this paper. Since the problems with the law relate to the three loopholes, I am chiefly concerning myself with the definition of subdivision and the family conveyance and occasional sale exemptions. Since the review criteria have also been a source of contention, I have noted the evolution of them as well.

\(^7\)Laws of Montana (1973), vol. III, chapt. 500.
Democrat Majority in House and Senate

In the '74 legislative session—a continuation of the 43d legislative assembly and the last year of annual sessions—an attempt was made to place a two year moratorium on rural subdivision. The purpose of House Bill (HB) 875 was to give local governments some breathing room so that they could get a handle on what was viewed as rampant development of Montana’s rural areas. Although the bill was killed in the House Natural Resources Committee, it is interesting to note that the concern over rural development began 19 years ago. The kinds of problems that we see today are not a new phenomena.

There were three subdivision reform bills in the '74 session. House Bill 1037 would have further weakened the law by changing the definition of subdivision to any divisions of land creating five or more parcels, regardless of size. The bill was tabled in the House Natural Resources Committee. House Bill 1017 and SB 617 were nearly identical bills that raised the acreage definition to 40 and provided an exemption for occasional sales. The Senate bill was tabled in committee (presumably to avoid duplication). House Bill 1017, sponsored by Rep. Harrison Fagg (R–Billings), was referred to the House Natural Resources Committee where the definition of subdivision was amended to include all divisions of land. The bill passed the House and wound up in the Senate Judiciary Committee where the definition was amended down to 20 acres. The bill was transmitted back to the House which failed to concur in the new amendment. A conference committee, chaired by Rep. Dorothy Bradley (D–Bozeman) and Senator Turnage, left the Senate amendments standing and sent
the bill back to the House for approval. This time HB 1017 passed and became law.

1975

Democrat Majority in House and Senate

The 44th legislative session brought further changes to the subdivision law. House Bill 652, sponsored by Rep. Dan Kemmis (D-Missoula), attempted to redefine subdivision as any division of land. The bill was killed in committee.

House Bill 666 ignited an exciting battle over the review criteria that a local government could use to approve or disapprove a land division. The bill was introduced in the House by Rep. John Vincent (D-Bozeman) and referred to the House Judiciary Committee. The bill removed the acreage from the definition of subdivision, required approval of any subdivision to be based on a finding of "net public benefit" by the governing body and removed the occasional sale exemption. The criteria to be used in making a finding of "net public benefit" were:

- basis of need for the subdivision
- expressed public opinion
- effects on agriculture
- effects on local services
- effects on taxation
- effects on the natural environment
- effects on lifestyles

The bill was moved to the House Natural Resources Committee which was chaired by Representative Bradley. The Committee amended the bill, replacing all occurrences of "net public benefit" with "public interest." They also reinstated the occasional sale exemption, replaced the criteria "effects on

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lifestyles” with “effects on wildlife and wildlife habitat” and added the criteria “effects on public health and safety.” House Bill 666 passed out of Natural Resources and was amended on the House floor with a 40-acre definition of subdivision. It passed the House by a 13 vote margin.

In the Senate, HB 666 was introduced and referred to the Committee on Fish and Game. In that committee it was amended to reinstate the 20-acre definition. It was given a “do pass” recommendation and passed by the Senate with a four vote margin. The House concurred in the Senate amendments and sent the bill to Governor Thomas Judge for his signature. But the Governor had different plans.

Citing the fact that “no bill has sparked more debate than HB 666”9, the governor refused to sign the bill. He returned it to the legislature with two proposed amendments. First, Governor Judge proposed that the basis of need for a subdivision be determined by regulations adopted by the local governing body. This would allow local governments to determine the needs of their jurisdiction. Second, he proposed that any “expressed public opinion” used to evaluate a proposed division relate only to the criteria that the local government must use in approving or disapproving a subdivision. This would prevent the criteria from becoming an “applause meter.”

The House concurred in the Governor’s amendments but the Senate did not. Because Montana has no pocket veto, the bill became law without the Governor’s signature or his amendments10.

1977

Democrat Majority in House; No Majority in Senate

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In the 45th legislative assembly there were attempts to both strengthen and weaken subdivision law. Senate Bill 110 would have removed the requirement that the approval of a subdivision be based on a written finding of public interest. It also removed all review criteria. The bill was killed in the House on second reading. House Bill 543 introduced by Representative Bradley revised the definition of subdivision to 40 acres and removed the occasional sale and family conveyance exemptions. It was killed in the House on third reading. The only bright spot of the session was the passage of Senate Joint Resolution (SJR) 43. The resolution directed the Joint Committee on Priorities to appoint a bipartisan legislative committee to study all Montana laws relating to subdivisions and report its findings and recommendations to the 46th legislative assembly. The reasons for the resolution were listed in the statement of purpose. Again it is interesting to note that the arguments for subdivision reform have not changed in the last sixteen years.

Whereas, the social, economic and environmental conditions presently existing in Montana make it imperative that Montana's citizen's be provided with adequate housing in an economic efficient and environmentally sound manner; and
Whereas, Montana's laws presently relating to subdivisions are not fully successful in achieving this goal; and
Whereas, certain areas of Montana are presently experiencing rapid urbanization and population growth with subsequent reduction of agricultural land; and
Whereas, Montana is faced with the possibility of a large population influx in the future ...  
(Montana Legislature, Senate 1977, SJR 43)
1979

Democrat Majority in House, Republican Majority in Senate

After the study by the Interim Subcommittee on Subdivision Laws (created by SJR 43), HB 46 was introduced by Rep. Earl Lory (R-Missoula) at the request of the committee. The bill removed the acreage limitation from the definition of subdivision, revised the family conveyance exemption to apply only to the 1st division of land for conveyance to each immediate family member, and removed the occasional sale exemption. In the House Local Government Committee, the occasional sale exemption was amended back into the bill which was returned to the House floor with a “do pass” recommendation. House Bill 46 passed the House and was transmitted to the Senate where it was killed in the Senate Local Government Committee.

Another bill, HB 879, was introduced by the House Judiciary Committee. It was far less comprehensive, only removing the 20-acre definition without addressing the exemptions. The bill passed the House and was transmitted to the Senate where it was referred first to the Senate Judiciary Committee, and then moved to Local Government Committee. This committee had already proven itself unreceptive of subdivision reform by killing HB 46. Rather than table this bill as well, they amended it so that subdivision was defined as any division of land creating six or more parcels regardless of the size of the parcels. The existing law distinguishes between minor subdivisions (i.e., 5 parcels or less) and major subdivisions (i.e., 6 parcels or more) for the purposes of review (MCA 76-3-609). The logic behind this is that a major subdivision will have more impacts and therefore should be more rigorously review. With the definition proposed in HB 879, only major subdivisions would be reviewed.
House Bill 879 passed the Senate and was transmitted back to the House for concurrence in the Senate amendments. The House failed to do so and a conference committee was formed. The committee was unable to arrive at a compromise and was dissolved and reconstituted with new members. The new committee was still unable to reconcile the differences between the House and Senate. The bill was tabled in the conference committee.

1981

Republican Majority in both House and Senate

House Bill 715, introduced by Rep. Earl Lory (R—Missoula) was the only subdivision reform bill of the 47th legislative assembly. It removed the acreage definition and tightened up the use of the occasional sale and family conveyance exemptions. It also specified the required components of a master plan. The existing law exempts subdivisions within an area where a master plan has been adopted from completing an Environmental Assessment (MCA 76-3-210). The law, however, doesn’t explain what the components of an adequate master plan should be. The bill passed the House, was transmitted to the Senate, and met its death at the hands of the Senate Committee on Local Government.

Interestingly, there was another bill, HB 192, that would have clarified the public interest criteria to make the subdivision review process a more precise one, removing some of the subjectivity that developers complain of. It was introduced in the House by Rep. Jack Moore (R—Great Falls) where it passed by a 81 vote margin. The bill was transmitted to the Senate but was killed on third reading.
1983

Democrat Majority in both House and Senate

In the 48th legislative assembly, Representative Lory made another attempt at reform by introducing House Bills 646 and 762. House Bill 646 represented a new strategy. Rather than change the existing law, the bill would have allowed local governments to formulate a more inclusive definition of subdivision and to restrict or eliminate the use of exemptions as best suited to the needs of the locality. In effect, existing law would become a minimum standard. The bill received a "do pass" recommendation from the House Natural Resources Committee and passed the House with 61 votes. In a political move, the Senate referred it to the Committee on Agriculture, Livestock and Irrigation where it was tabled.

House Bill 762, which was identical to HB 715 from the previous session, met a similar fate in the Senate Agriculture committee.

1985

No Majority in House, Democrat Majority in Senate

In terms of subdivision reform, the 49th legislative assembly was probably the most interesting session of the decade because of the innovative approaches taken. Representative Lory made another attempt at reform with a bill that kept the 20-acre definition but modified it to include "any parcels, regardless of size, which are part of a series of exempt transactions or divisions or which are multiple lots or tracts contiguous by point or line, joined by a common road system, or connected to a common sewer or water system." The target of this definition was probably the most egregious abusers of the loopholes, developers who create large 20-acre lot subdivisions. The bill, HB 827, also tightened up the
occasional sale and family conveyance exemptions so that they only applied to more "legitimate" uses. The bill received a "no recommendation" report from the House Natural Resources Committee and was killed on second reading.

Rep. Ray Brandewie (R-Bigfork), with the help of Jerry Sorenson, a planner from Lake County, came up with a novel approach to address some of the problems related specifically to 20-acre development. House Bill 791 provided a limited review for divisions of land consisting exclusively of parcels 20 acres or larger. The review consisted of a written determination of whether appropriate access and easements were provided. The review process would determine whether the access and easements were suitable for the purpose of providing services to the land. If access and easements were not suitable, services such as fire protection, school busing, ambulance services and snow removal would not be provided. The written finding was to be delivered to the county clerk and recorded on the certificate of survey or the deed of conveyance. The requirements for a public hearing, preparing an Environmental Assessment and a finding that the division of land was in the public interest did not apply.

House Bill 791 passed the House with a wide margin (20 votes) considering the fact that neither side of the aisle had a majority. Its performance in the Senate was even more remarkable. It passed on third reading by a unanimous vote and was signed into law

1987

Republican Majority in House, No Majority in Senate

If the 49th legislative assembly was remarkable for what it did, the 50th was at least as remarkable for what it undid. House Bill 783, introduced by

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Representative Brandewie, repealed HB 791 from the previous session. It seems that counties, in their application of the law, went far beyond what the legislators had intended. Since the law didn’t define “adequate access”, counties were left to their own interpretation. To make their review worthwhile, many counties defined adequate access as a paved road built to county standards. Developers went nuts and let their legislators know it. The ensuing backlash was enough to have the law repealed.\textsuperscript{12} House Bill 783 passed the House 88 to 4 and passed the Senate on another unanimous vote\textsuperscript{13}.

During the interim between these two sessions the Environmental Quality Council (EQC) took up the issue of subdivision reform. The EQC is a committee of House, Senate and public members that studies various environmental issues and reports its findings to the legislature, sometimes in the form of draft legislation. The 1985–87 EQC consisted of Representatives Dennis Iverson (Chair), Dave Brown, Bob Gilbert, and Hal Harper; Senators Dorothy Eck (Vice Chair), James Shaw, Larry Tveit, and Cecil Weeding; Brace Hayden from the Governor’s office; and Tad Dale, Tom France, Tom Roy, and Everett Shuey as public members. The committee’s findings were basically unsurprising. They found that the current law was indeed being abused and needed to be changed.

House Bill 809 embodied the findings of the EQC. Introduced by committee chair Dennis Iverson (R–Witlash), the bill was a complete rewrite of the subdivision law. This was something new, previous attempts at reform simply amended existing law. House Bill 809, eighty-one pages in length, represented a new subdivision law from the ground up. There was no acreage definition and no occasional sale or family conveyance exemptions. The bill did

\textsuperscript{12}Rich Weddle, Helena, telephone communication with Carter Calle, Missoula, 3 May 1993.

change the review process to make it more objective by removing some of the public interest criteria. The bill didn't go far. It was tabled by the House Local Government Committee which was concerned about the complexity of the bill and the limited time available to comprehend it.14

1989

*Republican Majority in House, Democrat Majority in Senate*

The only subdivision activity in the 50th legislative assembly was a pair of bills introduced by Rep. Dennis Rehberg (R–Billings). Representative Rehberg was a Realtor by trade, and his bills were intended to remove subjectivity from the review process but they did nothing about the loopholes in the law. House Bill 515 rewrote the statement of purpose of the subdivision law, inserting a sentence at the end about protecting the “rights incident to the private ownership of property”. House Bill 380 removed the requirement that a proposed subdivision be found in the public interest in order to be approved. It also removed “expressed public opinion” from the review criteria. Both bills were tabled in the House Natural Resources Committee.

1991

*Democrat Majority in both House & Senate*

The 51st legislative session began with four bills introduced to modify the subdivision law in one way or another. House Bill 399, introduced by Rep. Mary Ellen Connelly (D–Kalispell) left the subdivision law—and the loopholes—virtually intact and made changes that favored developers. The tone was very anti-regulation and pro-private property rights. Apparently, Connelly had a

14*Montana Environmental Quality Council Annual Report*, by Dennis Iverson, Chairman (Helena, MT 1987), 32.
personal grudge to settle with her bill. She had attempted to use an occasional sale exemption to avoid review for a land division. Because of her prior divisions to this tract of land, Flathead County found the exemption to be an evasion of the subdivision law and denied its use. She would have to go through the review process if she wanted to divide her land.

The following were the major changes included in HB 399:

- Requiring a court order before a government official could refuse to file a plat;
- Placing on local government the burden of proof that a landowner is not entitled to an exemption and further stating that the government may not impose any obligations on landowner or surveyor for proof;
- Eliminating the review process for minor subdivisions;
- Prohibiting park land dedication for minor subdivisions; and
- Limiting a local government's remedy for violations of the law.

House Bill 671 was more balanced than HB 399, but was still slanted towards developers. The bill has introduced by Rep. Bob Gilbert (R–Sidney) who had served on the Environmental Quality Council (EQC). The EQC had worked on the issue of subdivision reform, but HB 671 was not sponsored by the Council. Gilbert had taken many of the EQC's suggestions and then sat down with the Montana Association of Realtors (MAR) to draft this bill. House Bill 671 was a complete re-write of the existing law. It eliminated most of the exemptions that plagued the original law, but weakened the review criteria for subdivisions. Gilbert believed that it was the review process that drove developers to using the exemptions. He thought that the review process was too subjective and that
planners had too much power, which they frequently abused. He believed the exemptions in the law could not be removed without giving some concessions to developers.

The bill contained the following major provisions:

- Defining subdivision as any division of land;
- Eliminating the family conveyance and occasional sale exemptions;
- Maintaining the agricultural exemption;
- Replacing criminal penalties for violations with civil penalties, with a maximum fine of $5,000;
- Allowing a person who felt they had been injured by the review process to sue the governing body for actual damages;
- Shortening the review process for both major and minor subdivision review;
- Requiring a citizen who requests an informational hearing to show that they would be adversely affected by the subdivision, and allowing the cost of the hearing to be assessed to the citizen;
- Requiring all testimony at an informational hearing to be given under oath;¹⁵
- Eliminating all public interest criteria from the review process, the "applause meter" of expressed public opinion would no longer be allowed;
- Creating a new system for park-land dedication; and
- Creating new criteria for subdivision review which included the following:

¹⁵It is interesting to note that testimony in legislative hearings is not given under oath.
Rep. Mark O'Keefe (D–Helena) introduced House Bill 744. This bill was drafted by Representative O'Keefe with the Montana Association of Planners (MAP). The Planners felt that HB 671 favored the real estate industry too much. House Bill 744 amended the current law to eliminate the exemptions and—to appease developers—streamline the review process. The major provisions were as follows:

- Defining subdivision as any division of land;
- Eliminating the family conveyance and occasional sale exemptions;
- Maintaining the agricultural exemption but defining agricultural uses more rigidly;
- Retaining criminal penalty for violators and also creating a civil penalty, maximum allowable fine was $1,000 per day for every day of violation;
- Requiring testimony at informational hearings to be given under oath;
- Eliminating “basis of need” and “express public opinion” from review criteria but retaining all other criteria from existing law—adding “effects on historic and pre-historic resources” and “agricultural water user practices”; and
• Streamlining the process of park-land dedication and increasing
the size of required donations.

House Bill 844, the fourth and final bill was introduced by Rep. David
Wanzenried (D–Kalispell). This bill was drafted by the Montana Environmental
Information Center (MEIC) and simply eliminated the loopholes and did nothing
else. It was introduced with the purpose of making HB 744 seem more balanced.
House Bill 844 did not alter the current law except in the following ways:
• Defining subdivision as any division of land;
• Eliminating exemptions for family conveyance and occasional
  sale; and
• Maintaining the agricultural exemption but defining agricultural
  uses more rigidly.

On February 18, 1991 at 3:00 p.m., the House Natural Resources
Committee heard testimony on all four bills. The committee chair and vice-chair
were Rep. Bob Raney (D– Livingston) and Representative O'Keefe, respectively.
The committee was comprised of eleven Democrats and seven Republicans.
Representative Connelly's bill, HB 399, was presented first. In her opening
comments she stressed that her bill favored the small landowner. Five
proponents spoke on behalf of her bill. Four of them were real estate salespeople
and the fifth, Chet Drehers, was a private citizen involved in a legal battle over
his attempt to divide off seven acres of his property. He testified that he just
wanted to sell his property, he didn’t want to ask permission.

The six opponents of HB 399 were mostly county commissioners and
planners. Robert Rasmussen, representing MAP, pointed out that “the current
law doesn't deny a person the right to sell their land. It just sets up a mechanism
by which they can do so in a manner consistent with the public good.” He went on to state for the record that Chet Drehers never even submitted a plat for his proposed land division for review, choosing instead to go to court. (One year later, a district court found that Drehers was attempting to evade the intent of the subdivision law and forced him to submit his land division for review.\textsuperscript{16})

After testimony was heard on HB 399, the committee heard HB’s 671, 744 and 844 all at once. The fact that Representative Connelly’s bill was kept separate from the others implied that the committee was not giving it serious consideration.

After opening comments by Representatives Gilbert, O’Keefe and Wanzenried, sixteen proponents spoke in favor of the general concept of subdivision reform, and on behalf of which ever bill they preferred. They were mainly county commissioners and planners, but there were also a few Realtors as well as Chris Kaufman from the MEIC and Janet Ellis from the Montana Audubon Legislative Fund. Notably, Tom Hopgood, the lobbyist for the Montana Association of Realtors (MAR) spoke in support of HB 671, but not the other two bills. He also clarified that MAR’s support for HB 671 was obviously not unanimous because Realtors were testifying in support of other bills. The only opponent to the set of bills was Representative Connelly.

The hearing lasted four hours. Most of the committee’s questions dealt with technicalities of the bills. Nobody questioned the need to change the subdivision law. Representative Raney closed the hearing by setting up a special subcommittee to meet immediately and combine the three bills into a single one for the full committee to vote on.

The subcommittee met in a small room at 7:30 that evening. It was chaired by Mark O'Keefe and consisted of three Democrats and two Republicans. Basically, the Planners' bill (HB 744) was merged into the Realtors' bill (HB 671) with favoritism going to the Planners' bill. The changes to HB 671 were ratified almost entirely along party lines by a weary committee working late into the night. Representatives from both MAP and MAR were there to answer questions.

By morning, a modified version of HB 671 was returned to the House Natural Resources Committee. The major changes to the bill included the following:

- The provision allowing a landowner to sue the local governing body for actual damages was removed;
- The requirement that testimony at informational hearings be given under oath was removed;
- The restriction against hearsay evidence at informational hearings was removed;
- The criteria for subdivision review were changed to include:
  - effects on agricultural or agricultural water-user practices,
  - effects on cultural or historical resources,
  - effects on environmental or ecological resources including wildlife and wildlife habitat,
  - effects on local services, and
- The park-land dedication requirements were increased to the levels found in the Planners' bill.
The bill passed the Committee and was sent back to the floor of the House. There, an attempt was made by Representative Connelly to amend the bill to reinstate the three loopholes (i.e. the 20 acre definition and the occasional sale & family conveyance exemption) but it failed. House Bill 671 passed by a wide margin and was transmitted to the Senate.

In the interim, the Montana Association of Realtors withdrew their support for HB 671 which they now began referring to as the Planner's bill. They purchased advertisements in newspapers around the state urging voters to contact their senators and ask them to kill the bill. Representative Gilbert was outraged by the defection of MAR after working with them for so long. He found himself in the unusual position of carrying a piece of legislation that was favored by environmentalists and opposed by the business community. Gilbert pushed forward with HB 671, vowing to see it pass the Senate in spite of the Realtors' objections.

On March 15, 1991 at 1:00 P.M., HB 671 was heard in the Senate Natural Resources Committee. The Committee was chaired by Sen. Lawrence Stimatz (D-Butte) with Sen. Cecil Weeding (D-Jordan) as vice chair. Again, the committee was weighted toward the Democrats with seven serving compared to only four Republicans. The hearing was moved to the old Supreme Court chambers in anticipation of a large attendance. In fact, the room was filled to capacity with a crowd in the hall waiting to testify and the balcony seats filled.

Representative Gilbert introduced his bill with some interesting comments. He professed that he was about as much an environmentalist as Atilla the Hun, but that he recognized the need to stop the abuse of the subdivision law. He admitted that originally he had favored the real estate industry too much. House Bill 671, in its new form, represented a more balanced bill because
it gave equal consideration to both private property rights and the need for better planning. He proposed several amendments to the bill, most of which were to correct typographical errors, but significant changes were made to pacify the agricultural lobby. Although the agricultural community acknowledged that they were suffering due to unreviewed development, they weren’t willing to give up the family conveyance exemption which they used for estate planning purposes. A farmer or rancher’s largest asset is their land and the family conveyance exemption is used to transfer land to their heirs.

Twenty-five proponents spoke in favor of the bill. Again, they were mostly planners and county commissioners as well as a few more real estate agents. The proponents stressed that the bill protected the property rights of those buying property. The only people that would be affected by this bill, they said, are those that are profiting from abuse of the existing law.

After the proponents, twenty-two opponents testified. Consisting mainly of Realtors and a few private landowners, they asserted that the bill represented the loss of the right to sell property without government interference. Sen. Bernie Swift (R-Hamilton) declared the bill a “planner’s delight” which would make Montana much like the communist nations that are fighting for their freedom. He received rousing applause for his comments.

House Bill 671 eventually passed the Senate Natural Resources Committee but not without substantial amendment. Sen. Lorents Grosfield (R-Big Timber) added over twenty amendments of his own. By all accounts, Senator Grosfield simply couldn’t accept imperfections in any bill that came before him. By the time that HB 671 was sent back to the Senate floor, it had over 100 amendments.
Before second reading, a caller representing the "Flathead Vigilantes" threatened to shoot someone if the subdivision bill was passed. On April 4th, security was tight in and around the Senate chambers. Events began with Sen. Esther Bengston (D-Shepard) motioning to amend the bill so that minor subdivisions would be exempt from park-land dedication. The motion passed. Then, Senator Swift motioned to reinstate the 20-acre definition of subdivision. The motion failed.

After opening comments from Sen. Steve Doherty (D-Great Falls), who was carrying the bill in the Senate, the floor was opened for debate. Senator Grosfield led the attack of the opposition. Grosfield and several others who spoke out against HB 671 dwelt on the number of amendments to the bill claiming that any bill that required 106 amendments must be fundamentally flawed. Grosfield also targeted the complexity of the bill, saying if you can't understand it, don't vote for it.

The proponents were angered by Senator Grosfield's comments. Senator Doherty pointed out that Grosfield was responsible for many of those amendments, and now the Senator was not acting in good faith. Other proponents said that the number of amendments were proof that every effort had been made to create a balanced bill. House Bill 671 represented a trade off between private property rights and public good.

Senator Bengston, who had supported the bill in committee, said that she sensed too much confusion about the bill. She urged Senators to vote against the bill if they didn't feel good about it or else face their constituency when they returned home. At this point one could sense the tide turning against the bill. Anyone who was wavering was no longer going to support HB 671.

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In his closing comments, Doherty made an impassioned plea to Senators, asking them to see past the endless "what if" examples posed by the opposition and consider the benefits of passing the bill. If there were problems, they could be addressed in a future session. This would be a much better solution than to kill the bill and allow the abuses to continue for another two years.

The debate was closed and a vote was called. House Bill 671 was defeated by a vote of 26 to 23. Sen. Thomas Keating (R-Billings) moved to indefinitely postpone the bill. Indefinite postponement meant that unless a successful motion to reconsider the bill was made within 24 hours, the bill could not be reconsidered. The motion carried 25 to 24. Later that evening, a motion to reconsider the bill failed. For all intents and purposes, House Bill 671 was dead.

Subdivision reform, however, was not dead. Senator Bengston had introduced SB 195, entitled "An act to require the consideration of effects of subdivision development on water user entities." The bill had passed the Senate, the House Natural Resources committee and was on the House floor. Representative Gilbert amended this bill to close the loopholes in the subdivision law. The following were Gilbert's amendments:

- Redefining subdivision any division of land;
- Eliminating the occasional sale exemption;
- Eliminating "need for the subdivision" and "expressed public opinion" from the review criteria; and
- Declaring the act effective immediately upon passage and approval.

Senate Bill 195 passed the House and was referred back to the Senate for concurrence in the amendments. It was sent to the Senate Rules committee for a ruling on whether the amendments violated the joint House-Senate Rules. A bill
can't be so amended as to significantly change the original intent of the bill. After an hour of technical testimony, the committee asked the sponsor what she would like to see done with the bill. Senator Bengston asked that it be tabled.

On the Senate floor, Senator Doherty made a motion to force SB 195 out of the Rules Committee. It failed by a vote of 30 to 19. Any hope of reforming the subdivision law in 51st legislative assembly was lost.

At session's end, Representative Gilbert had already sworn that he would try again in the 1993 session. Senator Doherty said he too would make an attempt in the next session with a bill that would just close the loopholes.
Chapter 3
The Montana Audubon Subdivision Project

The Montana Audubon Subdivision Project was born out of the frustration of the 1991 session. After 18 years of trying, advocates of subdivision reform had come within two votes of success. While it was still a defeat, it gave people a renewed sense of enthusiasm and hope for the next legislative session. No sooner was the session over then Janet Ellis, Program Director for Montana Audubon, began to analyze what had happened.

In conversations with many lobbyists and the organizations that had been involved, Janet found the same complaints. There was not enough information. All the examples of bad development and the figures for how much unregulated development had occurred were out of date. The problems of unreviewed subdivision are economic, social and environmental in scope, but the only facet that had been well researched and developed were the environmental problems. This didn’t help the issue of subdivision reform escape its label as an environmental issue. Such a label made it difficult to attract the support of conservative legislators, especially those from eastern Montana where very little development is taking place. For these legislators, the argument that unreviewed development costs taxpayers money is a much more persuasive argument. The economic impacts needed to be researched and documented.

Another important area that had been lacking was public support. In a state as sparsely populated as Montana, citizen input can have a profound effect on the legislative process. When questioned as to why they voted against the subdivision reform bill, HB 671, many Senators said that telephone messages and letters from constituents numbered 10 to 1 in favor of killing the bill. The bill was
difficult enough to understand and with that kind of opposition they didn’t want to face voters without being able to explain why they voted for it. The Realtors and other opponents had been very effective at mobilizing their membership to contact legislators; the supporters had not.

All boiled down, the conclusion that Janet reached was that there just wasn’t enough pre-session preparation and coordination by the subdivision reform lobby. The opponents had a much easier time of it because all they had to do was convince legislators to maintain the status quo. If the reform lobby was going to convince legislators to vote for change—controversial change no less—then they needed to present a persuasive, well documented and easy to comprehend argument. They also needed to present this argument with a unified voice.

During the summer of ’92, Janet began drafting an outline for a subdivision project and talking to various people about getting it started. Many offered input as to what they wanted to see accomplished and ideas on how to fund it. While the interest level was high, it was difficult to pin people down on the matter of commitment. After wrestling with it for a few months, other priorities began competing for Janet’s attention and the subdivision project was placed on the back burner.

A year went by before the project worked its way back to the top of the Audubon’s agenda. Deciding not to wait around for other people, Janet took the lead in moving the project forward. Over the summer of ’93 she raised the money to fund the project. The majority of the money came from a few individual donors who were sold on how that changing the law would help on preserve open space. By summer’s end, Janet raised enough funding for a 3/4-time position for four months. She would have enough funding for a full-time
position by November. She advertised the position through various channels around the state. I was hired as the Audubon Subdivision Project Coordinator and began work on September 2, 1993.

The project had three major components. The first was to research and compile information documenting the problems with the current subdivision law. The second was to educate the public of the findings through public speaking, writing articles and a final report. The third component was to assist in organizing a coalition of groups around the issue of subdivision reform.

I. Research

The research component was the broadest category. When the project was first visualized, it was intended to be at least a year-long endeavor. The hope was to gather land division statistics (reviewed division versus unreviewed division) for every county in the state. The reality of a four-month project forced some reductions in the expectations. It was decided that I should focus on the counties that were experiencing the most pressure from development. As I began work it became apparent that even if I restricted myself to the fastest growing counties, it would still be difficult to gather information in such a short time period. The very nature of unreviewed development makes it difficult to analyze. Since there is no review, the local planners don’t know when a land division occurs. To track how much has happened in a county would require looking through the records at the county clerk’s office and recording such information by hand. Luckily, in a few of the larger counties, an extra effort had been made by the planning offices’ to record such information. Missoula County was the only county that had a completely computerized recording system. They were able to give me the most
up-to-date information. I was also able to compile statistics from Gallatin, Flathead and Lake Counties.

Another important aspect of the research was to quantify the costs of unreviewed development. We had hoped to produce an analysis for a single county which tallied the costs to the county for providing services to such developments and compare it to the costs of providing services to reviewed developments. Unfortunately, we ran into the same problems as before. The counties welcomed such a study since it would yield some extremely useful information for them. However, such a study would easily take at least a year just for one county due to the number of variables involved and the difficulty in pulling together the necessary information from several different county offices. It was for those reasons that none of the counties had already done such a study. There was also no guarantee that the results of the study would be advantageous. Almost all residential development is a net loss for a county because of the level of services necessary. While everyone would agree that the loss would be less for reviewed development, it wouldn’t make a very compelling argument in the legislature.

Instead we settled for individual accounts of costs due to unreviewed subdivision; a road that had to be upgraded and maintained in one county, a 20-acre development being hooked-up to city sewer systems in another. They were still very effective examples. I also was able to collect some information about tax rates in a few counties which were illustrative of the fact that 20-acre ranchettes were particularly costly to a county because they are taxed at agricultural rates.

The research stage of the project was more simple than first expected due to the great deal of coverage the subdivision loopholes had received in the media since the last session. There had been a lengthy series of articles in the Billings
Gazette that summer as well as articles in the Bozeman Chronicle, the Great Falls Tribune, the Daily Interlake (published in Kalispell) and others. They ranged from stories about the increased popularity of the state and the increased development pressures that came with it to specific battles between county commissioners and residents of unreviewed developments over road maintenance; from articles about the rising incidence of human-wildlife conflicts to the loss of agricultural lands to 20-acre splits. All of them ended with a discussion of the current subdivision law and how the problems could be avoided by fixing the law. In a sense, some of my work had already been done for me. The next step was to start sharing the information I was gathering.

II. Public Out-Reach

My first presentation on subdivision reform was at the Montana Audubon Council Meeting on October 3rd, 1993. I put together a 45 minute presentation that explained what the subdivision law was supposed to do, why it wasn’t working, what the impacts were and what was being done to change the law. I gave ten presentations over the next five months to various organizations.

Another method of getting out information about reform was through writing. I wrote an article for the Audubon newsletter which is regularly mailed to members throughout the state. This article was then made available to other groups and it appeared in newsletters for Northern Plains Resource Council, Trout Unlimited, Montana Wildlife Federation and Montana Bow Hunter. I was also fortunate enough to get coverage in local newspapers for a few of my presentations that led to a large profile of myself and the project in the Missoulian1. That story made me an “expert” on subdivision overnight, and I

1Michael Downs, “Endangered Land ‘Scapes: Conservationists Zero in on Loopholes in State’s Subdivision Law,” Missoulian, 12 December 1992, 1(F) and 6(F).
began receiving phone calls from reporters around the state who wanted examples and statistics or a quote in response to what someone had said on the subject. The largest article that I contributed to was one written by Norma Tirrell for Montana Magazine\(^2\). The issue hit the newsstands during the ‘93 session and received considerable attention.

The net result of all of this public outreach was that the project, and the issue of subdivision reform, had acquired a high profile. It helped build momentum that would carry through the coming session.

### III. Coalition Building

The coalition building component of the project would turn out to be as successful as the other two had been. The work on the coalition had begun before the Audubon project. Mary Kay Peck, Gallatin County planner and president of the Montana Association of Planners, had organized a meeting in July of nine organizations and state agencies to discuss the idea of a coalition. Once the project was rolling, I assumed the role of staff person to the coalition. For the second meeting on October 15th, I put together a database of organizations that we wanted to see in the coalition, and sent letters inviting representatives to the meeting. I also made a presentation at that meeting.

The first two meetings were simply to see who would come and to gauge their interest in forming a coalition. The meetings began with a presentation about the problems with the law, and then each representative spoke about whether or not their group would support reform. The meetings were rather open-ended and there was some grumbling by the attendees that they were uneventful. There was even some surprise among some people that known

enemies of reform like Ted Doney of the Montana Dairymen's Association and John Bloomquist of the Montana Stockgrowers were invited to the meetings. It was our goal to invite as many different groups as possible to these meetings because we wanted diversity for the coalition. We also wanted to get the agriculture groups onto our side. While individual ranchers and farmers had spoken out about the impacts of 20-acre ranchettes on their livelihood, the agriculture groups had opposed reform. They were sensitive about giving up the family conveyance and agricultural exemptions. We hoped that if we could develop a position on reform that they supported, then one of our largest obstacles would be removed.

We were hesitant to impose any type of structure (i.e. leadership) in the early meetings because we didn't want to scare anyone away. The downside was that we left ourselves little time to form a strong coalition. We were only able to have one more meeting before the 52d legislative began. At this meeting we had to decide on a position as a group, agree to form a coalition, and work out a legislative strategy. There was some risk that the process could be stopped by someone interested in sabotaging our efforts. To add more pressure to the situation, we had invited all 150 legislators to join us for this final meeting so that we could inform them of our position. We knew not all would attend. In fact we were fairly certain that only those sympathetic to our cause would bother attending. We realized that if we were not sufficiently organized, we could lose credibility.

The coalition meeting, held on December 8th at the Colonial Inn in Helena, was a great success. There were 29 people in attendance for the morning session representing 20 groups or state agencies. After a round of introductions, I began the meeting with a shortened version of my presentation. We then spent
the next two hours hammering out a position that everyone could accept. We agreed that the 20-acre definition of subdivision should be eliminated, the occasional sale exemption should be eliminated, and that the family conveyance exemption should be modified so that it couldn't be abused. This final point was an attempt to win the support of the agricultural groups in attendance. While none of them could propose a family conveyance exemption they would support, they made it clear that one was needed if they were not to oppose reform.

We then agreed to form a loose coalition and call it the Coalition for Subdivision Reform and went around the room to see who would participate. None of the state agencies were able to because the coalition intended to lobby legislators, something agency employees are forbidden to do. None of the agricultural groups in attendance would participate because they weren't sure yet whether they supported reform. There were a few other groups who couldn't say yes without seeking permission from their boards. We concluded with six groups definitely in the coalition and another nine who would report back.

None of the groups were willing to commit financial resources for a coalition lobbyist since most already had a full-time lobbyist. Instead, it was decided that the role of the coalition would be more for publicity purposes. We agreed to distribute a press release about the formation of the coalition, and to hold a press conference at the Capitol. We also agreed to combine our respective groups into a large phone-tree that could be activated when necessary.

The meeting broke for lunch, where we were joined by eight legislators. After lunch we returned to our conference room, informed the legislators of the mornings events and began a discussion of strategy. While the afternoon discussion was interesting, it was hampered by the fact that the only bill we could really discuss was Representative Gilbert's. He was already circulating a
draft of his bill which was essentially the bill that ended the last session. Without knowing all the bills we would be facing it was impossible to do any real strategy work. The legislators, while not really giving us any revolutionary insight, were very impressed with the diversity of organizations represented at the meeting. The coalition would turn out to be very useful in defining the reform movement as broad based.

After the meeting, I drafted a press release stating the Coalition's position which I circulated among the attendees. By the time the press release was actually sent out to the media, the coalition had twelve participating organizations. They were; The Montana Association of Counties, The Montana Association of Planners; The Montana Association of County Road Supervisors; The Montana Preservation Alliance, The Montana Association of Fish & Wildlife Biologists, Disaster & Emergency Services, The Montana Fire District Association, Montana Audubon, Montana Environmental Information Center, Montana Wildlife Federation, Montana Trout Unlimited, and The Tri-County Wildland/Urban Fire Working Group.

The actual news coverage that we received was a bit disappointing but the word was going around the Capital that a subdivision coalition had been formed—this proved effective enough. On December 18th, newly elected Governor Marc Racicot met with some members of the Coalition and pledged his support to reform. As it would turn out, that pledge proved useful much later in the '93 session.

IV. The Subdivision Fact Sheets

After the Christmas Holidays, I began work on the final stage of the Audubon project. Originally, the project outline called for a written final report that could be used by lobbyists to develop testimony. Janet and I decided that a
report would not be a very useful product because of the limited number of people who would actually read it. After four months of research, so much good information had been collected that we scrapped that idea in favor of assembling a packet of subdivision fact sheets. Each fact sheet would focus on a single topic, allowing the reader to go directly to a topic that interested them. Keeping the fact sheets to a single page would increase the likelihood that they would be read. The entire packet would be not only be circulated among lobbyists, but also distributed to legislators, the public and the media.

Before writing had begun, we were contacted by Lydia Green, a media consultant and writer, who had caught wind of the project and offered her services to us at a much discounted rate. Lydia had worked for the Clinton-Gore presidential campaign as well as Pat Williams' successful campaign for Montana's sole House seat. During our first meeting, Lydia proved herself very adept at condensing complicated issues and targeting them at a specified audience. We quickly realized that her involvement would lend a very professional feel to the packet.

For two solid weeks Lydia and I worked on the fact sheets. I would write one on a given subject, then hand it to Lydia who brought it to life and made it interesting. I would get it back to make sure that—after becoming interesting—the fact sheet was still factual. We made every effort to verify the examples and figures we used because one mistake could jeopardize the integrity of the entire packet. We wound up with six fact sheets that were held in a folder that we designed. We printed 500 copies and had them ready for the first round of committee hearings and the Coalition press conference.

I continued working on the Audubon project through January because successful fundraising enabled Audubon to extend the project. I coordinated the
lobbying effort and made informational presentations to the House and Senate Natural Resources Committees, where the subdivision bills would be heard.
Chapter 4
The 1993 Legislative Session

Before the 52d legislative assembly was underway, six legislators were talking about introducing subdivision bills.

Representative Bob Gilbert had been working tirelessly on his bill since the last session. He redrafted it to incorporate the hundred or so amendments that had been added in the Senate Natural Resources committee. Between sessions, Gilbert solicited comments from dozens of supporters and opponents of reform. It was more an exercise in process however, because subsequent drafts of his bill made it obvious that he wasn’t using many of the suggestions. Gilbert had a very clear idea of what he wanted for his bill and he didn’t appear interested in accommodating anyone else. He was especially uninterested in anything the Montana Association of Planners had to say. Gilbert’s dislike of the Planners had grown intense since the House subcommittee meeting that merged the Planner’s bill into HB 671.

Senator Steve Doherty had carried Gilbert’s bill in the Senate during the previous session and promised to return with a bill of his own after Gilbert’s bill was killed. During the interim he worked with the Department of Commerce to draft a simple subdivision bill; one that closed the loopholes, expedited the review process for minor subdivisions and left the rest of the law intact.

Rep. Russell Fagg (R–Billings) surprised people by announcing mid-summer that he was drafting a bill to close the loopholes. He had voted against Gilbert’s bill (HB 671) on second reading. Apparently, Fagg returned to Billings after the ‘91 session and took a job with the county attorney’s office. There he saw
first hand the problems that Yellowstone County was experiencing due to inadequate access and poor roads. It was all the evidence he needed to change his mind on subdivision reform. He got together with Bill Armold, the County Planner, to draft his bill.

Representative Ray Brandewie, decided to try his hand at reform one more time with another bill drafted with Jerry Sorenson, the Lake County planner. Brandewie had introduced a HB 791 in the '85 session which required a written finding of adequate access and easements on 20-acre parcels. That bill became law, but was later repealed by HB 783 introduced by Brandewie in the '87 session.

Senator Lorents Grosfield indicated that he would introduce a subdivision bill. Gilbert blamed Grosfield for killing HB 671 bill in the last session by nit-picking it in committee and fanning the fires of doubt on the Senate floor. The ironic thing was that Grosfield apparently supported reform. The amendments he placed on the bill clarified some of the bill's murky areas. By some accounts, they improved Gilbert's bill. Grosfield was just such a perfectionist that he couldn't support the bill with the minor flaws that he perceived still existed. At sixty-one pages it wasn't difficult to find flaws. About what shape his bill would take in the '93 session, Grosfield was not specific.

Finally, freshman Rep. Emily Swanson (D-Bozeman) was committed to reform and willing to carry a bill if necessary. After seeing what form the other bills were taking in their initial drafts, Representative Swanson decided to introduce a bill identical to Representative Wanzenreid's bill (HB 844) from the previous session. Her bill would be the simplest one, closing the loopholes and nothing else.
While Audubon supported Gilbert’s bill, we certainly preferred the simpler approach embodied in the other bills. We were troubled by the review process in his bill and by its anti-government tone. Our primary objective though, was to pass a bill that closed the loopholes. If it turned out to be Gilbert’s, then perhaps it could be amended into something that suited us.

That was not the way the Planners felt. Many of them believed that Gilbert’s bill was so bad that it was actually worse than the existing law. It would bring more land divisions under review but the review process would be so compromised that the net effect would not represent any benefit. Many felt that they would rather maintain what they viewed as an adequate review process than sacrifice it for the privilege of reviewing more land divisions. The more cynical ones believed that most of the damage the current law could wreak had already been done. They gave their lobbyist, Jim Richard, the directive to try and work with Gilbert to address their concerns. If Gilbert was unwilling, the Planners would be forced to lobby against it.

Audubon made it clear that we might part ways with the Planners if Gilbert’s bill was the only choice. We were not convinced that Gilbert’s bill was as bad as they made it out to be.

I. The Session Begins: Round One

The 1993 legislative session began on January 4th. A few days into the session, Jim Richard approached Representative Gilbert to introduce himself as lobbyist for MAP. Jim asked if he could speak to Gilbert about some concerns he had with Gilbert’s bill. To no one’s surprise, Gilbert was hostile towards Jim and the Planners, whom he referred to as “little tin gods”. He told Jim that he didn’t care what the Planners thought about his bill, because his was the only bill that was going to pass this session and Jim better get used to it. Gilbert walked away
before Jim could say anything else. It was pretty clear that the Planners were not
going to be working with Bob Gilbert in this session.

The subdivision bills were to be heard in the Natural Resources
Committees of the House and Senate. To educate them about the need for reform, Janet asked the chairs of both committees if I could give an informational presentation about the problems of unreviewed development created by the loopholes in the existing law. We assured both chairs that the presentation would not mention the various bills that were being drafted. Sen. Don Bianchi (D–Belgrade) had already voiced his support for reform at the final meeting of the Coalition for Subdivision Reform and was willing to schedule my presentation as soon as possible. Rep. Dick Knox (R–Winifred) was a harder sell. A rancher, Knox had not supported reform in the previous session and he seemed suspicious of our intent. I gave him a copy of my presentation outline to assure him that it wasn’t slanted toward a particular piece of legislation. After some hedging—and some pressure from Representatives Gilbert, Fagg and Swanson—he consented to a presentation as well.

The Senate Natural Resources Committee

Don Bianchi, (D) Belgrade, Chair  Bob Hockett, (D) Havre, Vice Chair
Sue Bartlett, (D) Helena  Steve Doherty, (D) Great Falls
Lorents Grosfield, (R) Big Timber  Tom Keating, (R) Billings
Henry Mclernan, (D) Butte  Bernie Swift, (R) Hamilton
Chuck Swysgood, (R) Dillon  Larry Tveit, (R) Fairview
Cecil Weeding, (D) Jordan  Jeff Weldon, (D) Missoula
On January 11th I made a presentation for the Senate Natural Resources Committee. The formality of the proceedings rattled me. To make matters worse, no one told me about the protocol of speaking through the chairman until I was about to begin my presentation. I made the mistake of accepting questions during the presentation which interrupted the flow and—to some extent—my concentration. The mistake allowed Sen. Tom Keating (R-Billings) to challenge some of the figures used at the beginning of the presentation as misleading. Even though I responded well, it got the presentation off on a shaky foot. If I had waited until the end to accept questions, he probably wouldn't have disputed the figures at all. Another issue, the taxation of 20-acre parcels, was challenged as being incorrect. This time however, Senator Grosfield came to my defense. He had legislation pending to raise the property tax on such parcels so he was familiar with the issue. His help went a long way in reestablishing the credibility of the presentation.

Before my presentation for the House Natural Resources Committee had been scheduled, Janet Ellis invited all the legislators with subdivision bills to attend a strategy meeting. With potentially six bills in the works, coordination between the sponsors was vital. Also, we had no idea what Gilbert's intentions were regarding the other bills. As chair of the House Taxation Committee, Gilbert swung a big stick within the House. If it was his desire to torpedo the other bills, he probably wouldn't have much trouble doing so. Before all the legislators had responded, an article appeared in the Helena Independent Record about the meeting¹. Gilbert leaked the story to the press.

On January 18th at the Sanders Bed and Breakfast in Helena, Bob Gilbert, Emily Swanson, Steve Doherty, Ray Brandewie, Russell Fagg and Lorents

Grosfield met at our invitation to discuss strategy. Also in attendance were myself and Janet Ellis from Montana Audubon; Jim Richard, lobbyist for MAP and the Montana Wildlife Federation; Stan Bradshaw, lobbyist for Trout Unlimited; Brian McNitt, lobbyist for Montana Environmental Information Center; Hugh Zackheim of the Montana Nature Conservancy; and Rock Ringling, owner of the Sanders.

The meeting began rather sluggishly. Each legislator was asked to give a brief statement of his/her interest in reform and a description of his/her bill. Grosfield announced that he was probably not going to introduce a bill and would focus instead on a taxation bill that would increase taxes on 20-acre parcels. Swanson, Fagg and Doherty all had similar bills that simply closed the loopholes, although Fagg’s bill removed several “public interest” review criteria. Gilbert and Brandewie’s bills were different from the rest in that they proposed significant changes to the review process, though Brandewie’s was not as sweeping.

Gilbert explained his bill with a windy lecture about how his bill was the only reasonable bill because he was the only one who had taken the time to talk to all the affected parties. Therefore, he was the only person who really understood what reform was needed. He was adamant that anyone else who claimed to be an “expert” on the subdivision issue really wasn’t and that his bill had the best chance of passing. He went on to say that he wasn’t going to be “jerked around” like he was last session and that he wasn’t willing to negotiate. His bill was the way he wanted it and he refused to do any amending of it. If his bill was amended he would withdraw it. More than anything else though, he was determined that his bill would not be shuffled into a subcommittee where it ran the risk of being merged with the other bills.
After he was finished there was an awkward pause. Gilbert had obviously vented his frustrations and for a few seconds it felt as though he expected everyone to agree with him and go home. But then Russell Fagg cleared his throat and suggested that we move to the next order of business which was strategy. I think it surprised Gilbert that the other legislators still intended to pursue their bills.

Russell Fagg began the discussion on strategy by suggesting that everyone agree to keep all the subdivision bills alive. Since it wasn’t reasonable to expect that six legislators could agree on a single bill, the legislative process should decide. He promised to support the other reform bills and he hoped the other legislators would reciprocate. He went on to suggest that all the bills be heard on the same day in committee. This way we could organize the proponents so they wouldn’t need to make several trips to the Capitol.

At first there was disagreement with his suggestion from Gilbert who thought that having more than one bill would spread the proponents too thin. But the more we talked, the more he realized that it was in his best interest that there be several bills. If one bill was killed, there would be other bills to take its place. It also avoided the possibility that the five bills would be merged into one by a subcommittee that wasn’t directly under his control—something he was mortally afraid of.

We agreed on the strategy that Representative Fagg proposed. All the bills would be heard on the same day in both the House and Senate and the committees would be asked to decide on each bill individually. All the bills alive as long as possible. If there was more than one bill standing at the end of the session then a conference committee would be formed to make the final decision.
The meeting ended with Representative Fagg offering to sign the other bills as an outward sign of unity. A legislator signs the bills that they introduce and usually seeks the signature of other legislators to show support. Representative Swanson liked the idea and promptly whipped out her bill and handed to Gilbert who signed it without hesitation. There were rounds of back patting and hand shaking as the legislators gathered their briefcases and left.

The spirit of cooperation between Gilbert and the other legislators was more than we could have expected. Nobody was shaken by his bully tactics at the beginning of the meeting. When it came down to it, Gilbert wanted to be involved and his softened demeanor showed that. For a while at least, he put his energies into supporting reform rather than pushing his bill as the only option.

As lobbyists, our own strategy was clear—keep the debate focused on the need for reform instead of the merits of a particular bill. If we could keep Gilbert happy, he might not pull the plug on the other bills. It was the first glimmer of hope that we had that a simple bill might make it out of committee. Letting the legislature decide which type of reform was needed was better than leaving it up to a single man.

After Gilbert’s bill was printed, Jim Richard analyzed it to comprehend all that it did. Jim had been a planner and was now a planning consultant and he understood the intricacies of the law better than any of the other lobbyists. Audubon was interested in his analysis because we just didn’t know what to think about Gilbert’s bill. What Jim found was—by his assessment—a fatal flaw.

The current law defines subdivisions in a section titled “Definitions” (MCA 76-3-103). The next section lists exemptions for certain divisions of land (MCA 76-3-201). This section begins with the umbrella language “Unless the method of disposition is adopted for the purpose of evading this chapter the
requirements of this chapter shall not apply to any land division which..." and lists the exemption. It is that language which gives local governments the authority to determine whether the use of an exemption is legitimate. If not legitimate, the exemption can be denied on the basis that it evades the intent of the law. Many local governments have developed evasion criteria to evaluate and identify inappropriate use of exemptions, a practice that has been upheld by Montana Courts.

House Bill 280 eliminated the section on exemptions entirely and incorporated them within the definition of subdivision. In doing so, the umbrella language was deleted. In Jim’s opinion, this removed the authority of local governments to prevent abuse of the exemptions. Instead of occasional sales and 20-acre plots, the new abuses would be the exemptions still allowed, such as divisions to create cemetery lots.

When presented with this information Gilbert was furious. However, he was not about to leave a weakness exposed. He promised an amendment to fix the problem. Gilbert had already backed down from his insistence that his bill would not be amended. He was having to amend his bill to reinstate an exemption that the Department of Transportation (DOT) needed to avoid surveying and platting lands acquired for state highways (MCA 76-3-209). Gilbert had done away with the exemption not realizing that it would cause a problem. He was shocked when the fiscal note\(^2\) for HB 280, prepared by the Office of Budget and Program Planning, projected the net fiscal impact of the bill on DOT for the next two years would be $1,252,000 a year. (In comparison, the fiscal note for SB 261 was only $107,00.) That amount represented the cost to DOT for surveying and platting each parcel it acquired for right-of-way. Each

\(^2\)A fiscal note is prepared by the Office of Budget and Program Planning for any legislation that might have an economic impact on the state budget.
amendment that Gilbert had to accept improved chances that we might later be able to amend the bill to our liking.

My presentation for the House Natural Resources Committee was finally scheduled on February 1st. Scheduled that same day was a presentation by the Montana Association of Realtors (MAR). The Realtors had been given the opportunity to present to both committees after I made my presentation in the Senate. I missed their presentation in the Senate but was able to get a recording of it from the committee secretary. After listening to their presentation, I wasn’t worried about going against them head-to-head.

To begin with, their presentation lasted 45 minutes, much longer than the 20 minutes the committee had allowed. They had four different speakers and there was little integration between them. Tom Hopgood, lobbyist for MAR, began the presentation by conceding that there were problems with the current law but that the purpose of their presentation was to explain how the problems should be solved. Steve Mandeville, a Helena Realtor and President of MAR, went next with a lecture on the principles of a free market system and laws of supply and demand. “The market will decide whether or not there is a ‘basis of need’ for a subdivision,” he claimed. “If a developer is willing to risk his capital then he shouldn’t be subjected to the ‘applause meter’ of public opinion as to whether or not his subdivision is in the public interest.” It sounded more like a lecture on micro-economics than an informational presentation. Mandeville ended by passing out what he called a “template” for legislators to use in evaluating reform bills. A good reform bill, he said, will contain the items listed in the template. It was a business card with his picture on the front. On a sticker on the back was printed the following list: private property rights; land use planning; affordable housing, development costs, simplify review process; and
review authority. The last item referred to the ability to sue the review authority for arbitrary actions.

Dan McGee, a member of the Montana Association of Registered Land Surveyors, was next to speak. McGee was the most credible of the speakers, not because of his command of the constitution and private property rights—of which he went on about ad nauseam—but because he had two alleged examples of arbitrary and capricious behavior on the part of local governments. His first example was a vague one about a proposed subdivision in Missoula that fronted an unpaved county road about six miles from the nearest paved road. The county wouldn't approve the plat unless the developers agreed to pave the roads in the subdivision. McGee thought that this was ludicrous since the county hadn't paved the road leading to it.

His second example was much more specific. It involved the proposed Story Hills Subdivision in Gallatin County. According to McGee, the developer was asked to put in cul-de-sacs rather than through streets to give the development more of a neighborhood feeling. The developer obliged, but was then told by the county road superintendent that the cul-de-sacs were too small for his snowplows to turn around even though they supposedly met county road standards. The developer doubled the size of the cul-de-sacs but was still denied the subdivision based solely on the objection of the road superintendent. This was an example, McGee claimed, of one man stopping a good development due to a review process that was too subjective, and unfairly skewed towards local governments. His examples were very damaging.

Esther Bengston, a former Senator from Shepherd, closed the presentation by pleading with the committee not to believe what proponents of reform might say. She seemed on the verge of tears as she painted reformers as thugs who
wanted to take away the rights of the little folk to do with their land as they pleased. I was told that Bengston was not well liked as a legislator. Her over dramatic closing remarks gave me some idea why.

I knew that my presentation was much better organized and focused which made it easier to follow. But we had to do something about Dan McGee’s examples. If we couldn’t refute them then we at least had to come up with some way to neutralize them. My presentation was filled with specific examples of problems caused by unreviewed subdivisions. I had pulled them out of the Senate presentation for the sake of time but decided to put them back in the presentation for the House Natural Resources Committee.

I contacted Pat O’Herron at the Missoula Rural Planning office. He couldn’t identify the subdivision that McGee had referred to in Missoula, but he assumed that if the county forced the developer to pave the roads in the subdivision then the county must have planned to pave the road to the subdivision in the near future. If we could figure out which subdivision he was referring to, we would probably find that to be the case.

Janet contacted Andy Epple, a planner in Bozeman, who remembered Story Hills but didn’t remember the circumstances surrounding it. He dug up the minutes of the city council meetings where it was discussed and found quite a different story than McGee had told. To begin with, the city never asked the developers to put in cul-de-sacs. In fact the city was opposed to them from the start because of the difficulty in maintaining them in the winter and because they are hazardous in emergency situations. Furthermore, the city had conditionally approved the subdivision contingent to the fulfillment of 18 conditions. Most of the conditions were to protect the city from future costs associated with the development of a 107 single family unit subdivision. The subdivision was finally
turned down because the city and the developer could not reach agreement on who should pay for off-site improvements\(^3\). We had what we needed to cast doubt on McGee's testimony.

House Natural Resources Committee

- Dick Knox, (R) Winifred, Chair
- Jody Bird, (D) Superior
- Russell Fagg, (R) Billings
- Mike Foster, (R) Townsend
- Hal Harper, (D) Helena
- Bob Raney, (D) Livingston
- Jay Stovall, (R) Billings
- Howard Toole, (D) Missoula

- Rolph Tunby, (R) Plevna, Vice Chair
- Vivian Brooke, (D) Missoula
- Gary Feland, (R) Shelby
- Bob Gilbert, (R) Sydney
- Scott Orr, (R) Libby
- Dore Schwinden, (D)
- Emily Swanson, (D) Bozeman
- Doug Wagner, (R) Hungry Horse

My presentation before the House committee was not quite as nerve rattling due largely to the fact that it was mostly a receptive audience. Three of the committee members were sponsoring subdivision bills and many others had voted for reform in previous sessions. We gave Representative Swanson, who is from Bozeman, the evidence to refute McGee's allegations. She was tickled.

I asked to present first and was allowed to do so. The room was exceedingly hot and I began sweating profusely which made it difficult to concentrate. Luckily, I had a handkerchief to mop my forehead. My hands were so sweaty that my outline kept sticking to my fingers and the transparencies were difficult to manage. It was, however, a much smoother presentation. The packet of subdivision fact sheets were ready to be distributed that day and I

\(^3\)Minutes of the Meeting of the City Commission, Bozeman, Montana, 6 February 1984.
passed out the first batch to the committee members after my presentation. It was a well planned move, because they read them during the Realtors presentation!

There wasn't much difference in their presentation the second time around. We waited with baited anticipation for Dan McGee. He changed the order of his presentation around and it began to look like he wasn't going to mention the Story Hills example. Then, he did it. He gave the account of the nasty road superintendent who stopped the wheels of progress. When he finished, Representative Swanson pounced. She asked if he had ever seen the minutes of the city council meeting in which the Story Hills subdivision was discussed. He hadn't. When she informed him that she had a copy of the minutes in her hand he nervously replied "you do?". She went on to read aloud from the minutes, showing his characterization of what happened to be untrue. McGee's face turned beet red as Emily admonished him for misrepresenting the issue to the committee. We had successfully cast a shadow over their presentation. Swanson shot us a wink as Chairman Knox moved the meeting to recess. As we shuffled out of the room I heard someone ask "Who the hell set up McGee?".

The presentations had been a good experience. Now with the fact sheets ready, we put our information dissemination activity into high gear. The five bills were scheduled to be heard in committee in the House and Senate on Wednesday, February 3d. Several environmental groups declared the day Conservation Lobby Day and sent letters inviting their membership. Involved were Montana Audubon; Montana Wildlife Federation; Montana Environmental Information Center; Trout Unlimited; and Northern Plains Resource Council.

The morning of the 3d, a workshop was held to educate attendees about the various bills of importance and to offer a quick lesson in how to lobby. I gave a presentation about the subdivision law and why we were working to change it.
Jim Richard gave a breakdown of the five bills and their differences. There were also presentations about the different bills affecting state mining laws by the lobbyist for Northern Plains.

In the afternoon, the Coalition for Subdivision Reform held a press conference in the Capitol Rotunda complete with buttons and placards demanding reform. There were several different speakers each with a different angle on why reform was necessary. The speakers included Ric Smith, a Realtor from Polson; Kelly Flaherty-Settle, a rancher; Paul Spengler from Disaster and Emergency Services; and others. The turn out was better than expected. There were at least 100 people in the rotunda and media people from around the state. We had boxes of the subdivision packets which were made available to everyone.

The first hearing of the day was before the Senate Natural Resources Committee at 1:00pm. Senator Doherty’s bill, SB 261, was the lone subdivision bill in the Senate. The hearing was moved from the committee’s usual room to the old Supreme Court chambers in anticipation of a large crowd. The floor of the chamber was standing room only and the gallery overlooking the chamber was full as well. Steve introduced his bill by waving a faded copy of “Montana Land Development: The Montana Subdivision Inventory Project”, a report produced by MEIC back in 1975. The report, he said, documented problems with the subdivision law 18 years ago and the situation has only gotten worse. He emphasized that there was a land rush occurring in anticipation of the loopholes closing. He beseeched legislators not to let another session slip away without taking action. He then explained his bill as a simple one that closed the loopholes and expedited the review process for minor subdivisions.

SB 261 was a short eight pages and did the following:
• removed the acreage limitation from the definition of subdivision;
• removed the occasional sale exemption;
• removed the family conveyance exemption;
• allowed local governments to set up an expedited summary review process for minor subdivisions; and
• allowed minor subdivisions within an area for which a master plan had been adopted to be exempt from review if the subdivision complies with the plan.

Thirty-one people testified in support of SB 261. I testified last and submitted as testimony a copy of the fact sheets for each member of the committee. To my delight they read them during the opponents testimony.

There were just 15 opponents to the bill. The Montana Dairymen’s Association, the Montana Stockgrowers and the Farm Bureau all testified against SB 261. One of the more notable testifiers was Dan McGee, who apologized to the committee for his misleading remarks about the Story Hills subdivision. I must admit that it took some integrity to stand up before such a large gathering and acknowledge a wrongdoing.

The next hearing was before the House committee at 3:00pm. This hearing was also held in the old Supreme Court chamber which was once again filled to capacity. Gilbert started the hearing off by introducing his bill, HB 280. In his opening comments he held up the subdivision fact sheets and suggested that anyone who wanted to know what the problems with the subdivision law were should read them. Then he said that anyone who wanted to know how to solve the problems with subdivision law should read his bill. His bill, he said, was the
only comprehensive bill and that was due to the fact that he had been working on this issue longer than anyone else.

HB 280 was 39 pages. Here is what it did:

- removed the words "public interest", "harmony with the natural environment" and "prevent overcrowding of land" from the statement of purpose (MCA 76-3-102). Added verbiage about the protection of "private property rights";
- revised the 20-acre definition of subdivision up to 160 acres, incorporated numerous exceptions into definition;
- removed the occasional sale exemption;
- limited the family conveyance exemption to 1 transfer to each member of an agricultural producer's immediate family (agricultural producer was defined as a person primarily engaged in agricultural production);
- repealed the minimum requirements for subdivision regulations (MCA 76-3-504) and limited local government regulation of subdivisions to specific issues identified in HB 280;
- created an acreage based scale to determine the amount of park land dedication to replace the existing requirements;
- removed all existing review criteria and replaced them with new criteria including specific hazards to be reviewed for, and mitigation requirements;
- repealed existing review procedure for minor subdivisions (MCA 76-3-609) and created a new expedited review process that did not allow for informational hearings on minor subdivisions;
• exempted minor subdivisions within master plan areas from review;
• required that access be provided to each parcel within a subdivision and that notation of access be made on the plat;
• provided the means for a citizen to file suit against a local government for actual damages caused by a decision or regulation that is arbitrary or capricious or exceeds lawful authority;
• Modified the requirements for environmental assessments of major subdivisions; and
• established the process and criteria for holding informational hearings.

The chair called for testimony. The line of proponents stretched out of the room. Most began their testimony by thanking Gilbert profusely for his unfailing commitment to reform, but said they couldn’t support his bill as introduced. The common theme was that the bill was too complicated or that it took away too much of the public’s ability to influence development in their own community. Only a few stood in support of his bill without reservation, including the Montana Dairymen’s Association and the Montana Stockgrowers. The reason for the great amount of deference to Gilbert was that no one wanted to anger him. To keep the process going, Gilbert had to be kept happy. If you supported one of the other bills, you didn’t want him mad. Representative Gilbert became the 600-pound gorilla that everyone tip-toed around.

The line of people opposing HB 280 was almost as long. Most of the people opposing Gilbert’s bill opposed subdivision reform no matter which bill it
was in. A lot of them said they opposed all the bills but they didn't want to repeat themselves four times so they wanted to be on record as opposing all bills. The net effect was that the opposition to Gilbert's bill seemed enormous even though most of the opponents opposed the other bills. It was fortuitous that Gilbert's bill happened to be first. Dan McGee was in the line of opponents but again it was only to apologize. Interestingly, the Montana Association of Realtors (MAR) neither testified in support nor opposition to Gilbert's bill. Tom Hopgood, lobbyist for MAR, later confirmed that they were neutral on HB 280 and that they would actively oppose the other four bills. The only bill that would have MAR's support would be the Surveyor's bill. They had one drafted but as yet had not found a sponsor.

Gilbert closed saying he was angry at some of the people who testified as proponents. They should have been lined up with the opponents and he planned to "talk" to them in the hallway.

The next bill was Representative Swanson's bill, HB 242. She stressed the simplicity of her bill, saying the existing law was fine except for the loopholes. House Bill 242 was a mere six pages. The bill:

- revised the 20-acre definition of subdivision to 640 acres;
- removed the occasional sale exemption; and
- limited the family conveyance exemption to 1 transfer to each member of an agricultural producer's immediate family,
  (agricultural producer was defined as a landowner with at least $1,500 of annual agricultural production).

There was, again, a long line of proponents. Most said that they preferred the simple approach to reform contained her bill and others. One of the most effective testifiers was Tim Swanson, Mayor of Bozeman—Representative
Swanson’s husband—who pointed out that in the last ten years, only 2 subdivisions in Bozeman have been denied. If the review process was so onerous, he asked, where was the evidence?

Testifying in opposition to HB 242 were the Realtors and a few other groups.

The next bill heard was HB 408, Russell Fagg’s bill. At ten pages, it was more complex than HB 242. His bill:

- removed the “public interest” wording from the statement of purpose;
- removed the acreage limitation from the definition of subdivision;
- removed the occasional sale exemption;
- removed “public interest”, “basis of need”, and “expressed public opinion” from the review criteria and established new review criteria;
- required that access be provided to each parcel within a subdivision and that notation of access be made on the plat; and
- limited the number of informational hearings to two.

The people testifying for and against HB 408 were the same as the previous bill. (The minutes for this committee hearing have not yet been made public. This section will be expanded when the minutes are available.)

Representative Brandewie’s bill, HB 218, was the last to be heard during this marathon hearing which had already taken 3 hours. His bill was closest to Gilbert’s in the scope of the changes it proposed, yet at 13 pages it was still
considered a simple bill. Here is what his bill would have done to change the subdivision law:

- revised 20-acre definition to 40 acres;
- removed the occasional sale exemption;
- Limited the occasional sale exemption to 1 transfer in each county;
- defined “rights of property owners” as the right to use, enjoy, improve, sell, and convey, in total or in part, real property as long as the exercise of the rights do not deny these rights to other property owners or adversely affect public health, safety and welfare;
- required that subdivision regulations protect the rights of property owners;
- required public notice for subdivision applications and hearings;
- removed “basis of need”, “expressed public opinion”, and “effects on taxation” from the review criteria;
- required that local governments establish an expedited review process for minor subdivisions;
- limited review criteria for minor subdivisions to effects on water and public health;
- prohibited park land dedication requirements for minor subdivisions; and
- required consideration substantive evidence only at public hearings.
There was more opposition to HB 218 than to the previous two bills largely due to the fact the bill only raised the acreage definition to 40 acres. Many thought that there would still be a substantial market for 40-acre parcels and that the problems of the past two decades would only repeat themselves. Brandewie, in his closing comments, stated that he would be open to raising the acreage amount somewhat, but certainly not past 160 acres. He arrived at 40 acres because he believed it would be sufficient for Lake County where there weren’t many large tracts of land left.

The hearing ended around 7:30 P.M. Many of us (legislators included) had been there since 9:30 that morning and we all were exhausted. We were happy with the days proceedings. There was very little outright opposition to the bills. For the most part, everybody supported subdivision reform—or at least accepted it as a inevitable. The differences arose over what form it should take.

The next day’s media coverage of the hearings was surprising. The press had all but anointed Gilbert as the undisputed champion of subdivision reform. The Associated Press article claimed “the bill with the broadest support appeared to be one by Rep. Bob Gilbert.” Given that almost all of the proponents for HB 280 said they preferred a simpler bill, the reporters present must not have been listening. To some extent, the slant towards Gilbert was understandable. He was the most recognizable legislator associated with reform because he had worked on the issue for so long. However, it was incorrect to report that his bill had the most support. It was the beginning of a myth about HB 280 that Gilbert himself would be fooled by.

We had heard rumblings that a newly formed group, Defenders of Montana, would show up with a busload of people to oppose any change in the

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subdivision law but that never happened. Jacob Korell, a Realtor in Bozeman, had organized Defenders of Montana. They sent out a letter touting themselves as the last protectors of private property rights. They promised to take up not only the subdivision issue but also the reintroduction of buffalo to Montana and other public lands issues. One of the cartoons they hoped to place in newspapers around the state showed a wolf, labeled environmentalist, tearing at the stomach of a cow. The word “ranchers” was written across the cow.

The only other group lobbying against subdivision reform was the Montana Association of Registered Land Surveyors (MARALS). The group had drafted their own subdivision reform bill but couldn’t find anyone willing to sponsor it. For a while it was rumored that Sen. David Rye (R-Billings) would carry the bill even though he was reluctant to do so. Apparently he was being pressured by Realtors who had contributed to his campaign. In the end, Sen. Bernie Swift (R-Hamilton) wound up carrying the bill.

Senate Bill 343 was referred to the Senate Natural Resources Committee. At 42 pages, it was even longer than Gilbert’s bill. The bill:

- struck the statement of purpose and replace it with language concerning the protection of the “rights of property owners”;
- defined “rights of property owners” as the right to use, enjoy, improve, sell, and convey, in total or in part, real property;
- retained the 20-acre definition of subdivision;
- retained the occasional sale exemption;
- retained the family conveyance exemption;
- provided the means for a citizen to file suit against a local government for actual damages caused by a decision or regulation that exceeds lawful authority;
• removed requirement that local regulation provide for the avoidance traffic congestion, unnecessary environmental degradation, danger to health, safety, or welfare by reason of natural hazard;
• removed requirement that local regulations provide for the identification of areas unsuitable for development because of hazards and prohibit subdivision in these areas;
• removed requirement that an environmental assessment include a community impact report containing a statement of the anticipated needs of the proposed subdivision for local services;
• removed all review criteria and established new criteria which did not include effects on wildlife and wildlife habitat or effects on the natural environment; and
• required that mitigation measures imposed by the local government to overcome hazards not restrict a landowner’s ability to develop land and that mitigation should be designed to provide some benefits for the subdivider.

In short, SB 343 was a developer’s dream come true. Thankfully, the committee tabled the bill and it remained tabled for the rest of the session.

On February 9th, the Senate Natural Resources Committee gave SB 261 a “do pass” recommendation and returned it to the floor of the Senate. Three days later, during second reading, a successful motion was made by Sen. John Harp (R-Kalispell) to amend the bill, reinstating the family conveyance exemption. It then passed second reading by a vote of 28 to 21. The following day it passed third reading 28 to 22 and was transmitted to the House.
The significance of HB 261 passing the Senate could not be overemphasized. It proved that the Senate could not only pass a subdivision bill, but that it could pass a simple one. If Doherty’s bill went no further, it had been an important trial balloon, testing the winds within the Senate.

Meanwhile, the House Natural Resources Committee appointed a subcommittee to decide what to do with the four bills before it. The subcommittee was chaired by Representative Gilbert, and included Representatives Fagg and Swanson as well as Representative Hal Harper (D–Helena) and Representative Jay Stovall (R–Billings). The subcommittee was going to return a complex bill—HB 280— and one of the simple bills for the full Committee to vote on. House Bill 408 was chosen as the simple bill because it occupied middle ground—it was less complex than HB 218 but more complex than HB 242. However, HB 408 was not returned to the Committee unamended. The term “tract of record” was defined.\(^5\) The definition of subdivision, which had included all divisions of land, was changed to divisions of land smaller than 160 acres. Also—at Gilbert’s insistence and with Fagg’s blessing—coordinating language was written into HB 408 that declared it to be void if HB 280 was passed and approved. The subcommittee didn’t finish its work in the first meeting so a second one was scheduled.

Before the second subcommittee meeting, Jim Richard went to the Montana Stockgrowers’ headquarters for a meeting with agriculture groups to see what could be done to gain their support for HB 408. Without support from agriculture, there was little hope for Fagg’s bill once it left Committee. In attendance were John Bloomquist, lobbyist for the Stockgrowers; Ted Doney, lobbyist for the Dairymen; Jamie Dogget, lobbyist for the Montana Cattlewomen; and

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\(^5\) This term is important because the first five divisions from a tract of record are reviewed as minor subdivisions, the next division is reviewed as a major subdivision.
and Lorna Frank, lobbyist for the Farm Bureau. In turned out that they could support Fagg’s bill with very little change. Two of their concerns—the “tract of record” and the definition of subdivision—had already been addressed. All that was left was a family conveyance exemption that would allow a farmer or rancher to give land to his family. Jim suggested an exemption like the one found in HB 218, which allowed a single gift or sale in each county to each member of the landowner’s immediate family. With the exception of the Farm Bureau—whose membership directed the organization to oppose reform—the agriculture groups agreed to support Fagg’s bill with that exemption. There was now agricultural support for both simple and complex reform.

Jim and Janet were overjoyed. They rushed to tell the members of the subcommittee the good news and to find a member that would propose the necessary amendment. The first person they found was Representative Harper, and he was willing to place the amendment. They went on to find the other subcommittee members. Janet found Representative Gilbert and excitedly told him about agriculture group’s support for HB 408. Gilbert exploded in her face! He accused Janet of trying to sabotage his bill. He saw agricultural support for Fagg’s bill as a direct threat to his own. He was so mad that he threatened to pull his bill from Committee and kill the other bills and then stormed off.

Janet was horrified. This was exactly what everyone had been afraid of—Gilbert going on a rampage and killing the other bills. When the subcommittee met that afternoon, Representative Gilbert got so angry when Representative Harper proposed the family conveyance amendment that it was quickly withdrawn. Fagg’s bill was returned to the Committee without the amendment. House Bills 218 and 242 were tabled.
Janet sent a letter to Gilbert that evening explaining that she and Jim had acted in accordance with the strategy of keeping all the bills alive—a strategy that he had agreed to⁶. They sought agricultural support for HB 408 because they felt it necessary ensure the bill’s passage. It was not meant to damage his bill, but to improve Fagg’s bill. Gilbert calmed down the next day, and agreed to allow HB 408 to be amended on the House floor.

The two bills were heard on second reading on February 17. Representative Gilbert carried both bills on the House floor because HB 408 was considered a committee bill and he had been chair of the committee that produced it. Gilbert’s bill was heard first. Rep. Howard Toole (D–Missoula) successfully amended HB 280 with language that softened the right to sue local governments. The bill then passed the House by a vote of 79 to 21.

Next was HB 408. Representative Brandewie made an attempt to amend the definition of subdivision in the bill from 160 to 40 acres. Gilbert, who had been uncharacteristically quiet to this point, leapt to his feet and fiercely criticized the amendment. The man who threatened to kill the bill three days ago was now defending it! The motion failed by thirteen votes. Rep. Alvin Ellis (R–Red Lodge) made a motion to amend HB 408 with the family conveyance exemption that the agriculture groups desired. The motion passed by 83 votes. House Bill 408 then passed second reading by a vote of 77 to 22.

Both bills were heard the following day on third reading. House Bill 280 passed by a vote of 68 to 29 and HB 408 passed by a vote of 77 to 22. The bills were then transmitted to the Senate.

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Almost a full month went by before there was any more activity on the three subdivision bills still alive. During that time the legislature had taken a mid-session break.

Two advertisements appeared in newspapers around the state after the first round of committee hearings. The first was placed by MARALS on February 21st and it was a rambling diatribe against the three remaining subdivision bills. The ad was text heavy, filled with typos and written in a very self-righteous tone. The gist of the ad was that the Surveyors had been martyred at the Capitol because they were the only ones left who were fighting for private property rights. "I am not your hired gun", the ad stated over and over again. It implored the readers to call their legislators and demand that SB 343, the only true reform bill, be pulled from Senate Natural Resources Committee.

The next ad appeared on February 28th. This one was paid for by the Billings Association of Realtors and was much less wordy than the surveyors ad. This ad pitted "TOTAL GOVERNMENT CONTROL" against "PRIVATE PROPERTY RIGHTS" in bold type across the top of the ad. It went on to say that all subdivision legislation was intended to take away the reader’s property rights and that legislators should be told to oppose any legislation giving government total control of property rights. There were no specifics in the ad—not even the various bill numbers were listed.

II. Round Two

On March 12th, the next round of hearings began. The House Natural Resources Committee heard testimony on SB 261. Senator Doherty introduced his bill with much the same introduction as before. Among those testifying in favor of SB 261 was George Shunk from the Montana Department of Justice who
spoke in support of closing the loopholes in the subdivision law. While he didn’t endorse a particular bill, he did warn that any bill that significantly changed the existing law (such as HB 280) risked nullifying twenty years worth of Attorney General rulings.

Tom Hopgood, MAR lobbyist, led those testifying in opposition to Doherty’s bill by clarifying for the committee that MAR did not endorse any of the recent newspaper ads. If they had, he said, they would have been concise, truthful and factual. The supporters of reform looked around at each other in amazement. The Realtors were distancing themselves from the Surveyors and the radical element within their own group. Hopgood acknowledged that the exemptions were as good as gone but asked the committee to only accept a bill that expedited the review process. Since Doherty’s bill didn’t do that, he asked the committee not to recommend its passage.

Dan McGee of the Surveyors spoke next. He stated that SB 261 eliminated essential private property rights in an attempt to solve problems that didn’t exist. McGee then pulled out a thick stack of papers which he said was a State Supreme Court decision from 1988 (Gallatin County vs. Tammy Leach). The case was brought against Gallatin County by a landowner who had been denied the use of an exemption based on evasion criteria used by the county. The court declared that the evasion criteria were outside the scope of the law and struck them down. His point was interesting but since the issue of evasion criteria was not what was being discussed no one was really sure why he made it. In fact, if the subdivision law were changed, counties would not have to rely on evasion criteria to stop bad development and would be spared the cost of being taken to court.

Next in line was the president of MAR, Steve Mandeville, who re-read the Association’s position statement. Then the lobbyist for the Dairymen, Ted Doney,
offered the following list of what a subdivision bill would have to contain if his
group were to support it:

- A definition of subdivision no higher than 160 acres;
- An agricultural use exemption;
- One exempted conveyance to each immediate family member;
- The “applause meter” removed from review criteria;
- An exemption for relocation of common boundary lines;
- An exemption for agricultural buildings if buildings are added
to the definition of subdivision; and
- A definition for the term “tract of record”.

The Stockgrowers echoed Ted Doney’s comments. Since they were
supporting HB’s 280 and 408, the assumption was that they made this statement
to justify why they weren’t supporting Doherty’s bill.

After all the testimony was finished, Senator Doherty closed by pointing
out that George Shunk had been involved in the Supreme Court case cited by Mr.
McGee and that the entire decision had been struck down on appeal. McGee was
harpooned again.

The hearing had been a good one. Although no one would give Doherty’s
bill a snow-ball’s chance in hell at getting out of committee—much less surviving
on the House floor—some important progress had been made. The opposition
continued to crumble. The Surveyors had begun to look comical and the Realtors
didn’t want to be associated with them. No one was mounting a serious,
organized effort to stop reform. Perhaps more importantly though, the

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7Gilbert’s bill included condominiums, mobile homes and work camp structures in its
definition of subdivision. It did exempt shelter provided for employees of an agricultural
producer.
agricultural lobby was climbing on board with us. The assumption was that they had seen the writing on the wall, that reform was going to happen, and they wanted to protect their interests.

The last hearing was held a week later on the 19th of March. House Bills 280 and 408 were heard in the Senate Natural Resources Committee at 3:00 P.M. There was a growing sense of excitement that subdivision reform was going to happen. The hearing began with HB 280, and, much like the last time, most people testifying in support of the bill were doing so to stay on Gilbert’s good side. There were, however, those that truly supported only Gilbert’s bill. In Gilbert’s opening comments he walked the committee through a long list of amendments he proposed to fix problems in his bill. He was clearly not happy about having to amend it.

The first proponent, Becky Donaldson, was very effective. She supported HB 280 because of the changes it proposed to the review process. A resident of Lewis and Clark County, she was a landowner in the middle of dividing a parcel that she could have done using an occasional sale exemption. She decided to go through the minor review process instead, “to be a good citizen”. She has since spent $15,000 trying to work with the county planning office but hasn’t been able to complete the project. She had suffered through unwarranted delays, changing regulations and specifications, bills for staff time and expenses and countless extensions. She can’t recover her investment until she sells the property and since she gave up her occasional sale exemption, she has no choice but to continue at the mercy of the planners. She was the first person to effectively illustrate the downside of bureaucracy. Thankfully she was the only one.

The Montana League of Cities and Towns testified that they could support Gilbert’s bill if it weren’t for the loss of legislative immunity. They worried that
HB 280 would provide a new cause of action to sue local governments. The Helena Board of Realtors testified in support of HB 280 even though their parent organization (MAR) wouldn’t. Hoarace Brown, the County Surveyor from Missoula, testified in support of reform. He was supposed to testify during HB 408 so as not to imply support for HB 280 but screwed up. The Stockgrowers and Dairymen testified in support of both bills met their criteria. The Montana Wood Products Association (WPA) testified in support of both bills but worried that HB 408 didn’t explicitly include silviculture in its definition of agriculture (HB 280 did). He proposed an amendment that would rectify that problem and allow their complete support.

The opponents for HB 280 included Whitefish City Council members and City Attorney who were angry with the bill’s adversarial tone towards local governments. Jim Richard testified on behalf of MAP on the same basic issues.

Testifying against any reform were the regular bunch opponents such as Dan McGee. At this point, nobody took these folks seriously.

HB 408 was heard next. In his opening comments, Fagg said that he had intended silviculture to be included in the definition of agriculture and that he would amend his bill if that’s what it took to ensure it. As it would turn out, a statement of legislative intent, written into the minutes of the hearing was all that was necessary. The Wood Products Association still wanted an explicit amendment but there was a lot of apprehension about accepting any amendments because the House would have to concur in them. If it didn’t, the bill was dead. Fagg reached a compromise with the WPA that if his bill was successfully amended by someone else, then their amendment would be added. If not, then the statement of legislative intent would suffice.
The proponents and opponents for HB 408 were the usual folks. The hearing ended with Fagg’s closing comments. It was now up to the committee to take the next step.

A final ad was placed on March 24th, after the last round of hearings on all three bills. This one was paid for by People For Property Rights out of Billings. It proclaimed in large letters “Your property rights are being stolen by threat, deceit and hysteria.” It countered some of the central arguments of reform (i.e. valuable agricultural land is being taken out of production) with their version of the facts (if there is a shortage of ag land why is the U. S. paying millions of dollars to take ag land out of production?). By taking these arguments and some of Gilbert’s comments out of context, the ad did a good job of casting HB 280 in an unfavorable light. I had to pause and think about why their “facts” were wrong. Someone less knowledgeable on the subject would probably be inclined to believe them. But the ad focused only on Gilbert’s bill, a mistake given the events that were about to unfold. It shifted attention away from the other two bills and if anything, helped them.

The House Natural Resources Committee had done nothing as yet with SB 261. Both legislators and lobbyists had grown tired of Representative Gilbert's abrasive style. He was being handled with kid gloves and there was still no way to predict what he would do next. His commitment to letting the process choose the vehicle for reform seemed weak at best. His unwillingness to work with anybody finally took its toll on the other supporters of reform. Representative Swanson decided that she would move that action be taken on SB 261. If Gilbert voted to table the bill or return it to the floor with an adverse recommendation, it would prove that Gilbert wasn’t committed to keeping all the bills alive. It would free everyone to pursue which ever bill they preferred. Senator Doherty and
others could vote against Gilbert’s bill without losing any political capital. It would light the fuse on the powder keg but everyone knew that it had to be done and nobody was excited about it. On March 26th, action was moved on Doherty’s bill. Gilbert responded as expected and voted to table it. The battle had begun.

An hour later, while the House Natural Resources Committee was still meeting, Senator Bianchi, chair of the Senate Natural Resources Committee, decided to take executive action on HB 408. No action was taken on HB 280. It was Bianchi’s intention to give Fagg’s bill a chance in the Senate before doing anything with Gilbert’s bill. It was no secret that Bianchi strongly preferred a simple reform bill. The Committee had also shown that it supported simple reform by passing SB 261. They sent HB 408 back to the floor of the Senate with a “do pass” recommendation.

Tom Hopgood was present at the meeting and went off to inform Gilbert that his bill had been held in committee and Fagg’s bill sent to the floor. Gilbert went ballistic. Everyone associated with Fagg’s bill was told to give Gilbert a wide berth or risk being shouted at. He began accusing the conservation lobby of setting him up and stabbing him in the back. He demanded that his bill be let out of committee. There was no way Senator Bianchi was going to let that happen until a vote had been taken on HB 408. Fagg’s bill was scheduled for second reading on the following Monday.

On March 29th, the Senate convened at 10:00 A.M. There were two agendas for the day. The first agenda listed thirteen bills to be heard on second reading. All the bills on the first agenda were fiscal bills which had a deadline of March 30th to be returned to the House for concurrence in any Senate amendments. House Bill 408 was listed on the second agenda which didn’t have the same urgency. However, since the final meeting of Senate Natural Resources
Committee was scheduled for the next day, it was necessary that the Senate vote on HB 408. Senator Greg Jergeson (D–Chinook), the Senate Majority Leader, motioned to move HB 408 to the first agenda. That way the committee could take action on HB 280 if necessary. The motion passed and the bill was moved to the bottom of the list. It was going to be a long day!

In preparation for the floor debate, Audubon put together some information which it distributed to several sympathetic Senators. A list of people and organizations who testified in favor of HB 408 was assembled. It listed forty-four supporters which were separated into categories such as agriculture, local government, public interest groups, conservation groups and others. Jim Richard assembled a short, one page outline of the arguments in support of HB 408. It included a specific rebuttal to the charge that the bill endangered private property rights (Article 5 of the U. S. Constitution and Article II of the Montana Constitution unequivocally protect private property rights). To show that the bill represented compromise, it explained what both sides (developers and local government/conservationists) gave up in HB 408.

To accompany these items was a compilation of figures from several different counties showing the amount of unreviewed land division that had occurred since January 1st. In Gallatin County alone, 7,000 acres had been divided outside the review process. In Ravalli County the famous Bitterroot Stock Farm, 6,600 acres, was divided into 20-acre tracts. The total for the counties listed was 35,338 acres. Backing up these figures were articles from various newspapers about the “land rush” as it was being called.

The day dragged on, with an hour break for lunch and no break, for dinner. At approximately 9:00 P.M., second reading on HB 408 began. The clerk read the title of the bill, and then was asked by the Chairman of the Committee of
the Whole whether there were any amendments. There was one by Senator Bernie Swift. Swift made a motion to amend the bill to include "effects on water-user entities" in the review criteria. It was not something that the agricultural interests had expressed concern about. Swift’s purpose in proposing the amendment was to force the bill back to the House. The motion failed by a wide margin. HB 408 would remain unamended.

Senator Doherty carried HB 408 in the Senate. He opened the floor debate by once again waving a yellowed copy of MEIC’s 1975 study on subdivision in Montana, saying that it was time to change a law that has been dogging the state for 20 years. Quoting some of the figures on land division since the session’s beginning, he emphasized that action had to be taken now to stop the rampant development that was occurring in anticipation of reform. After explaining that HB 408 represented the simplest and most balanced way to change the law, he yielded for debate.

Senator Tom Beck (R-Deer Lodge) went first, angrily demanding to know what had happened to HB 280 and why it wasn’t being heard at the same time as HB 408. Doherty replied that the bill was still in committee and that the committee wouldn’t be able to decide what to do with it until tomorrow when it met at noon. Senator Beck then accused the Democrats of pulling a fast one by not presenting both bills to the floor at the same time. Senator Jergeson stood and denied the charge saying that there was no conspiracy afoot. He defended the actions of the committee saying that they passed to the floor what they felt was the best bill. If the Senate didn’t like it, they could kill it and then vote on Gilbert’s bill.

Senator Grosfield rose and asked Senator Bianchi, chair of the Natural Resources Committee, if indeed the committee would pass Gilbert’s bill out.
Senator Bianchi replied that he had no idea what the committee would do, but that it would take some sort of action tomorrow at noon. Senator Beck again accused "the other side of the aisle" of being unfair with HB 280 and playing partisan politics. In a huff, Bianchi grabbed his microphone and rose to respond but the Speaker didn’t see him and instead yielded to Doherty who reminded the Senate that HB 408 was a Republican bill. The Speaker asked for any other comments, and seeing none, he asked Doherty to make his closing remarks.

With the floor debate closed, the President called the vote. At 9:29 P.M., HB 408 passed second reading by a vote of 36 to 13 with one Senator excused. We were absolutely stunned! The Democrats held the Senate by a 10 vote margin. Since we couldn’t count on unanimity of support from Democrats, we were not completely confident that we had enough votes to pass the bill. Not only did we get almost complete Democratic support (29 votes), we picked up 7 Republican votes! None of the lobbyists could explain it. Had we reached enough people with the Coalition and all the public outreach we had done to pressure legislators to change their vote? Were their some grudges being settled? Gilbert’s Taxation Committee had not been kind to Senate bills. Had we been set up with a dummy vote? Nobody knew for sure, but there was too much celebration going on to worry about it too much.

The floor debate had been remarkably short. The Senate had been moving that day at a pace of less than one bill an hour. By the time they got to HB 408 they had been in session for over ten hours. Since committee meetings began at 7:00 A.M. that morning and since most of them attended committee meetings during their lunch break, they had been at the Capitol for more than 14 hours! The Senators were too tired to wage another long debate. After some quick announcements, the Senate adjourned until 1:00 P.M. the following day.
That evening and the next morning, a lot of thought was given to what the next move should be. Letting HB 280 out of committee and on to the Senate floor was considered too risky. No one understood the vote of the previous night and there was no guarantee that the votes existed to kill it. If it passed, the coordinating language in it would void HB 408. Simply tabling HB 280 was not a very attractive alternative either due to the political fallout. Gilbert was already making noise to the press about being “betrayed” by the environmentalists who were keeping his bill in committee and threatening some nasty retribution if it didn’t make it to the Senate floor. The only acceptable course of action was to amend the objectionable sections out of Gilbert’s bill and turn into something less harmful. Even if it survived the committee and Senate it probably wouldn’t survive a return trip to the House for concurrence in the Senate amendments.

Two hours before the Committee was to meet, Jim Richard drafted the amendments necessary to take the bite out of HB 280. It was decided that Senator Jeff Weldon (D-Missoula) would wield the hatchet.

The Senate Natural Resources Committee met as scheduled at 12:00 P.M. with two bills on the agenda. The first, an air quality bill, took an hour. When it was through, Senator Bianchi announced that the committee had been excused from the floor of the Senate which was going into session, and that the committee wouldn’t adjourn until it had taken final action on HB 280. The proceedings began with Senator Grosfield moving to amend the bill with the amendments proposed by Gilbert to fix several of the bill’s problems. The amendments passed by a unanimous vote. Then, Senator Weldon began with his amendments.

The first amendment struck “providing for actions against governing bodies” from the statement of purpose and passed by a 10 to 3 vote (Senators Grosfield (R) and Tveit (R) supporting). The second amendment returned the
"evasion language" to the definition of subdivision and passed by the same 10 to 3 vote. The third amendment eliminated the section allowing actions against a governing body and passed by a vote of 9 to 4 (Tveit supporting). The fourth amendment struck Gilbert’s changes to the guidelines for establishing local subdivision regulations and passed by a 9 to 4 vote (Tveit supporting). The fifth amendment returned the public interest review criteria and passed by an 8 to 5 vote (Tveit supporting, Weeding (D) opposed). By now the grumbling of the Republicans on the committee could not be ignored. Swysgood and Swift were particularly aggravated as Gilbert’s bill became a shadow of it’s former self. As Weldon proposed his sixth amendment, Ted Doney, lobbyist for the Dairymen, walked up behind Senator Grosfield and said “looks like you’ve been had”. Grosfield, who had been supporting the amendments in good faith, hoping to get the bill out of committee, exclaimed “No shit!”. He called the proceedings ridiculous and made a motion to adjourn, which failed on a party line vote. Senator Swysgood was enraged. He accused the Democrats of playing games by sandbagging Gilbert’s bill with amendments to the point where no one would vote for it. Senator Weeding replied that it cuts both ways and reminded Swysgood that certain members of the committee who were upset now did the same thing to Gilbert’s bill two years ago. Senator Kennedy then moved to table HB 280 which was approved unanimously. The meeting was quickly adjourned.

The Senate had been in session while the Natural Resources Committee was taking action on HB 280. Third reading of HB 408 had been postponed until their return. At 3:24 P.M., the President of the Senate called for the final vote on Fagg’s bill. It passed third reading by a vote of 38 to 12. This vote was even better than the last one because it included one more Republican! House Bill 408 made it through the 53d legislative session. All it needed was Governor Marc Racicot’s
signature and it would become law. Because it went into effect upon passage and approval, Montana was just a few days away from an end to abuse of the subdivision law. Or so we thought.

**III. Round Three**

After a bill wins approval in both sides of the legislature, it is signed by the President of the Senate and the Speaker of the House. It is then forwarded to the Governor for his signature. The first sign of trouble came the next day when the Speaker, Rep. John Mercer (R-Polson), postponed signing HB 408. The delay gave he and Gilbert time to formulate a strategy to undermine the bill. The bill wound up on the Governor’s desk on April 2d, with a request from Mercer for an amendatory veto. An amendatory veto would signify that the governor approves of the bill, but with amendments. He would send the bill back to the legislature for changes. However, no one really believed that HB 408 would ever see the light of day if it wound up back in the House. Meanwhile, a move had been made on the 30th of March to pull HB 280 from Committee to the Senate floor. The motion failed by a vote of 21 to 29. Gilbert’s bill was going to stay tabled.

The political maneuvering was intense. Unofficial reports said that Lieutenant Governor Dennis Rehberg, a staunch opponent of reform in previous sessions, was lobbying the Governor to veto the bill. It was anybody’s guess as to which way the Governor would go. He was committed to reform; he had said as much in a meeting with coalition members before the session began. But Gilbert and Mercer were not to be dismissed. The Governor had a controversial sales tax proposal (Montana currently has no sales tax) in the House Taxation Committee of which Gilbert is chair. The Governor clearly needed their support.
The Governor was also under a lot of pressure from the public and the media to take action. The Coalition activated its phone-trees, telling people to call the Governor and demand that he sign HB 408 without amendments. Newspaper articles noted that calls to the Governor’s office were running 2 to 1 in favor of signing the bill. Since the law was effective immediately upon signing, the land rush magnified in intensity as people who had waited to see if a bill would pass frantically tried to divide their land before the change. An article in the Bozeman Chronicle reported that 29,000 acres had been divided in Gallatin and Park counties since the previous Friday. It also reported that residents in Missoula County were filing 200 to 300 new parcels a day, compared to a normal rate of two a day. Someone coined the term “Racicot’s Ranchettes” to describe the new 20-acre plots.

On Saturday, April 3d, the Governor invited representatives from the Surveyors Association (MARALS), the Montana Association of Counties (MACo), and various conservation groups for separate meetings to discuss HB 408. He also met individually with Representatives Gilbert, Fagg and Swanson as well as Senators Bianchi and Doherty. On Sunday, there was still no decision.

Monday, April 5th, rumor spread in the morning that the Governor would sign the bill. By the afternoon, the rumor had changed to the Governor vetoing the bill. Finally, on April 6th, the Governor quietly signed HB 408 into law. A signing ceremony with the media in attendance was held the following day at 10:00 A.M. Montana finally had a new subdivision law! It is said that all Gilbert could do upon learning the news was stare and shake his head.

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IV. The Aftermath

That is not to say that he was impotent. Gilbert was incensed that his bill had died in committee and he vowed to make those he felt responsible pay for their actions. The first bill to suffer was Senate Bill 426. Sponsored by Sen. Kennedy, the bill died in Gilbert’s Taxation Committee the day that Racicot signed HB 408. The bill was titled “An Act to Revise the Special Improvement District (SID) and Rural Special Improvement District (RSID) Revolving Fund Laws.” The bill would have made it possible for counties to continue using RSID’s to fund the creation and improvement of infrastructure and services in rural areas. Without the bill, counties would not be able to fund such necessities. This was viewed by many as a direct retaliation against Senator Kennedy, who voted to table HB 280, and Senator Weldon (because the bill was vital to Missoula County) for his effort to amend HB 280. Senate Bill 426 was actually pulled from Taxation onto the House floor where Gilbert led the charge to kill it on second reading.

Another bill important to Missoula, SB 364, would have redefined the term “family” within state zoning statutes to allow the term to apply to unrelated adults living together. The bill was especially necessary in a college town like Missoula to permit the rental of property by unrelated adults in areas zoned only for families. The bill passed second reading in the House by a wide margin. The next day, it failed on third reading by 20 votes. According to Jeff St. Peter, legislative aide for the city of Missoula, Gilbert had pressured several Republicans to change their vote.

Gilbert next target was a bill that environmentalists had fought hard to kill. On April 21st he convinced Rep. Dick Knox to call an emergency meeting of the House Natural Resources Committee (which had ceased meeting for the
The purpose of the meeting was to revive SB 196, sponsored by Sen. Gerry Devlin (R-Terry) which the Committee had tabled. The bill allowed a one year window of opportunity for landowners to pull up underground storage tanks without complying with the Montana Hazardous Wastes and Underground Storage Tank Act. The bill was a water quality nightmare which Gilbert himself declared a terrible piece of legislation earlier in the session. Before calling the emergency meeting, Gilbert told several individuals that he wasn’t done yet with his revenge. When Brian McNitt confronted Gilbert about the nature of his sudden about face on SB 196, Gilbert replied “you gotta do what you gotta do.” The bill passed the House on third reading by a vote of 66 to 33.
The final gavel fell on the 1993 legislative session at approximately 11:00 P.M., Saturday, April 24th. By most standards, it was a pretty gruesome session as far as environmental issues were concerned. Senate Bill 338, The Dangerous Waste Siting Act and SB 346, the In-Stream Flow bill, were both important bills that went down in the House despite outstanding lobbying efforts. Environmental disasters like SB 401, weakening the Montana Water Quality Nondegradation Act and SB 320, revising the Montana Metal Mine Act, passed and were signed into law. Senate Bill 196, the underground storage tank exemption bill was brought back to life after most people thought it was no longer a threat. In a session with very few bright spots, the passage of HB 408 shines as a towering accomplishment.

More than anything else, the successful effort to reform the subdivision law confirmed some of the basic principles of lobbying. Count your votes, especially in committee, and keep recounting until you get a majority. Work the floor; keeping your finger on the pulse of the legislative body will prevent any nasty surprises. Never assume anything and certainly don’t get cocky. The Montana Association of Realtors are an example of the dangers of complacency. After twenty years of winning they got lazy and stopped doing there homework. They assumed they could kill anything in the Senate and underestimated the momentum that had built for reform.

Coalitions are important. They bring together a diversity of skills and personalities in a synergistic way. Janet’s lobbying skills so well complemented Jim’s technical knowledge of the bills that it’s difficult to imagine what
would have happened if the two had not worked so closely together. The Coalition for Subdivision Reform was so loosely organized that it probably wouldn't have met the most rudimentary definition of a coalition. Yet, it is perceptions that count and the Coalition went a long way in portraying the reform effort as broadly based and unified.

Be realistic. Contrary to Gilbert's assertion that he was set up by a conspiracy of actions, what happened to his bill was an evolution of events. Every day, an assessment of the relative status of each of the bills was taken and decisions were made on the most realistic expectations. At first it wasn't possible to visualize more than one bill—Gilbert's. As the chances for other bills improved, steps were taken to improve the chances of all of them. By being realistic at each stage, the mistake of over reaching was never made.

Good information is invaluable. The most significant contribution of the Audubon Subdivision project was specific information about the impacts of unreviewed subdivision. When placed next to the vague inferences of unjust planners or the hype of private property rights, they were devastating to the opposition. Again, in MAR's laziness they didn't bother to spend any time on this aspect of lobbying. In the 1991 session, neither had the proponents of reform. This session was different.

Rep. Bob Gilbert deserves a lot of the credit for making subdivision reform possible even if he doesn't want to acknowledge it. He was on the Montana Environmental Quality Council (EQC) when it issued a report in 1987 calling for reform\(^1\). His interest in the issue centered around economic burdened that unregulated development placed on local governments. His experience on the EQC led him to introduce a reform bill in the 1991 legislative session. The near

\(^1\)Montana Environmental Quality Council Annual Report Tenth Edition: Research Topics, by Dennis Iverson, Chairman (Helena, MT: 1987).
success of that bill was the first taste of blood for everyone interested in reform. It reinvigorated the battle after eighteen years of failure. The momentum that carried forward from his work is why we have reform today.

The Audubon project was lucky enough to get in front of the momentum. We were able to focus and channel the momentum to productive ends. Besides information gathering and public outreach, I served as a facilitator for people and groups wanting to get involved. Having a name and a phone number associated with the reform effort was invaluable in coordinating and networking all the disparate interests that were coalescing around reform.

Bob Gilbert’s accusation that he was “betrayed” by the environmental lobby is unfair. There was never a conspiracy to undermine his bill. We never would have thought that there would be any bills other than his. Our strategy was to keep him happy as long as possible so that he would allow the other bills to live. We were committed to reform and we wanted the most politically salable bill to make it out of committee. We had no control over the committees. We would love to have as much power as Bob attributes to us but the performance of other bills this session makes that allegation a bit weak.

Gilbert was blind-sided by his own ego. From day one he insisted his bill was the only subdivision bill that would pass. He believed so firmly that intimidation would be adequate to pass the bill that he never enlisted the support of the organizations lobbying for reform. The only effort he made to work with anybody was in making the Realtors neutral on his bill. There was nobody to champion HB 280 when its status got shaky. He absolutely refused to modify areas of his bill that concerned a lot of people.

Gilbert’s caustic personality won him few friends on either side of the legislature. There were plenty of legislators with grudges to settle by voting for
HB 408. He also failed to work the Senate very well on behalf of his bill, probably because he was so busy as the Chair of the House Taxation Committee. He didn't show up for committee votes which could have changed the outcome. It's a lot harder for the members of a committee to take negative action on a bill when the sponsor is looking over your shoulder.

Representative Gilbert didn't take readings to gauge support of his bill. He fell victim to the myth that the media created during the session that his bill was the automatic choice. The media anointed Bob Gilbert as the uncontested king of subdivision reform. Gilbert just assumed the support was there when it really wasn't.

The impression that Gilbert's bill was a shoe-in was perpetuated by the media which failed to even mention the other bills in articles about subdivision reform. Without attending the hearings or talking to legislators, it would have been impossible to know that a bill other than HB 280 had a chance of passing. The myth of support for HB 280 is probably why the opposition advertisements that appeared singled out HB 280.

There was never a conspiracy to kill Representative Gilbert's bill. Things simply evolved. Circumstances changed from one day to the next. There were many points when it looked like the subdivision bills would die. We did what we could to keep the process going. Until the House Natural Resources Committee vote on SB 261, we lobbied in support of Gilbert's bill because we felt it important to keep him committed to the process.

It was Bianchi's decision to take action on Fagg's bill, not ours. It actually caught us off-guard. Remember though, that this was a committee that had already given a "do pass" recommendation to Doherty's bill—which was almost identical to Fagg's. Bianchi and his committee favored the simple approach to
reform embodied in HB 408. The Senate must have been comfortable with that approach as well because it passed the bill with a wide margin.

What happened to HB 280 illustrates the legislative process at work. The process chose the bill that would finish the session. Gilbert didn’t do the work necessary to manage the process. In the end, the Senate had different priorities than the House.

With the loopholes closed, it is up to the counties to do an adequate job of reviewing development. Only time will tell if the fight to reform the Montana Subdivision and Platting Act will yield better development for the state. As for Montana Audubon, Janet hopes that land-use planning issues remain at the top of Audubon’s legislative agenda.
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Appendix
DEFEND YOUR PROPERTY RIGHTS

TOTAL GOVERNMENT CONTROL

VS

PRIVATE PROPERTY RIGHTS

All current Subdivision Legislation is directed toward total GOVERNMENT CONTROL of your property rights.

You must take action now to protect your rights as landowners, taxpayers and residents of Montana to provide a future for you and your children. The interests of private property owners who live on the land are being ignored!!!

THE RIGHT TO DIVIDE YOUR LAND AS YOU SEE FIT... G O N E

This is your last chance to voice your concern without a private property rights amendment to the State Constitution! Private property rights should be sacred in a free land!!!!

Contact your Representatives and Senators N O W or live with the consequences of a quagmire law which will prohibit you from planning your future without unnecessary and overwhelming government intervention.

Call now 444-4800 or Fax 444-4105
Governors Office 444-3111

ASK YOUR LEGISLATOR TO OPPOSE ALL SUBDIVISION LEGISLATION GIVING GOVERNMENT TOTAL CONTROL OF YOUR PROPERTY RIGHTS

Billings Gazette, 28 February 1993
I am not your hired gun. I am licensed and registered by the State of Montana to perform land surveying. I am paying for this ad from my basic responsibility as a land surveyor and my Montana heritage that has been engraved in me to "protect the adjolner." You are my adjolner.

You have come to me consistently for advice and consultation regarding your land and your future. You have asked me to represent you in your previous actions before your governing body.

I have been one of the many voices you may have unconsciously heard trying to protect your interests before the Legislature during the last 18 years. I have been continuously tested on the laws in the existing Montana Subdivision and Platting Act. I know its strong points, and I know its weaknesses.

I have incessantly written letters to, talked with, and testified before the Legislature on your behalf.

But I am not your hired gun. I am only one of the concerned persons who have strived to bring a sound, viable and workable subdivision reform bill to the 1993 Legislature. Workable for you, workable for your local governing body, and workable for the future of the State of Montana.

I deserve more than the insults I feel from certain Legislators.

A true subdivision reform bill, Senate Bill 343, the only bill before the Legislature that protects your true interests, has been shelved during actions of the Senate Natural Resources Committee. I have done all I can to protect your interests, I can do no more.

If you feel the responsibility and the need, call 444-4800 now, and ask to talk to your Legislators. Get a copy of SB343 at your local Clerk and Recorder's Office. Get a copy of your Legislators' options XX280, HB300, and SB261. You will soon be convinced that you need to act now. SB343 is your only future, and your future is in your hands.

You must take action now to protect your rights as landowners, taxpayers, and residents of Montana to provide a future for you and your children.

Contact your Representatives and Senators now to revive SB343, or live with the consequences of a quagmire law which will prohibit you from planning your future without unnecessary and overwhelming government intervention.

There are three other bills before your Legislators in Helena as you read this. If any bills other than SB343 pass, forget your future as a landowner.

I am not your hired gun, as some Legislators may think. Act now for yourself, act now for SB343, your children, and your future.

Tom Sands Kalispell Professional Land Surveyor
Daniel W. McGee Laurel Professional Land Surveyor
Tom Sedestrom Kalispell Professional Land Surveyor
Rick Gustine Bozeman Professional Land Surveyor
Gregory F. Martinsen Missoula Professional Land Surveyor
Dennis Applebury Victor Professional Land Surveyor
Daniel P. Brien Somers Professional Land Surveyor
Tom Russett Conrad Professional Land Surveyor
Milt Frethetm Whitefish Professional Land Surveyor
Bill Reichhoff Kalispell Professional Land Surveyor
Richard G. Goacher Kalispell Professional Land Surveyor

Billings Gazette, 21 February 1993
YOUR PROPERTY RIGHTS ARE BEING STOLEN BY THREAT, DECEIT AND HYSTERIA

What do you really want? Subdivision hysteria by Representative Gilbert OR the real facts?

GILBERT: All of Montana is being divided into twenty-acre tracts and larger parcels.

FACT: Only 1% of the state's 93,000,000 acres have been divided in the 1st one hundred years.

GILBERT: All of Montana's valuable agricultural land is being lost to subdivisions.

FACT: Most of the subdivided land is low producing ag land and if there is a shortage why is the U.S. paying millions of dollars to take ag land out of production?

GILBERT: Property owners and ranchers are in support of his subdivision bill.

FACT: Thousands of acres are being divided by property owners in order to avoid his legislation and property owners and ranchers are speaking out against current legislation.

GILBERT: Subdivisions are the cause of the weed problem in Montana.

FACT: Thousands of miles of railroad beds and railroad right of ways' irrigation ditches, county and state roads right of ways create more problem with weeds than subdivisions.

GILBERT: People who stand for property rights are “TO THE RIGHT OF ATILLA THE HUN.”

FACT: These people just want to keep their property rights without total governmental control of their lives.

THREAT: If you don't pass Gilbert's bill HB 280, they have two others in the works, Rep. Fagg's HB 408 and Sen. Doherty's SB 261, they'll pass that are a lot worse.

CALL YOUR LEGISLATOR! 444-4800 • FAX 444-4105
GOVERNOR'S OFFICE 444-3111
Paid for by: People For Property Rights, C. Fiscus, Billings, MT

Helena Independent Record, 24 March 1993
Subdivision Fact Sheets
The Last Best Place is disappearing right before our eyes . . .
Today, we are witnessing the wholesale destruction of Montana's wide-open spaces, as our state continues to be subdivided and sold off in 20-acre parcels. If we don't act now, we could lose everything we love about the Last Best Place, including wide-open spaces, easy access to hunting and fishing, affordable land and a rural lifestyle that's the envy of all our neighbors.
### Dividing up Montana

**The loss of our western heritage**

Will the Last Best Place soon disappear, a victim of haphazard development and rural subdivisions? That’s what could happen, if we don’t tighten up the loopholes in the current state law that regulates land division.

Loopholes in the Montana Subdivision and Platting Act allow 90% of all land divisions in Montana to escape review by local government. Unless we give counties the right to regulate this development, we will wind up destroying the very things we Montanans love most—wide-open spaces, easy access to hunting and fishing, and a rural lifestyle that is the envy of all our neighbors.

**Buying a piece of Big Sky Country**

In the past few years, America’s romance with the West has turned into a love affair with Montana. Promoted in films like *Far and Away* and *A River Runs Through It*, the Last Best Place has become trendy with affluent city and suburban dwellers who want to own their own piece of paradise. Land development companies in Montana are capitalizing on this trend, exploiting the weak subdivision law to divide large agricultural properties into ranchettes which are then advertised for sale in slick brochures and national magazines.

Call today! Our land experts are here to help you make that dream come true—owning land in clean, fresh, beautiful Montana, land you can enjoy for generations—and all you have to do to get started is pick up the phone.

—From a brochure selling 20-acre ranchettes to out-of-state residents

**Protecting Montana’s future**

But it isn’t just large developers who are responsible for the devastating loss of rural acreage occurring around the state. Because of the cumulative effects of smaller subdivisions, individual landowners who divide up and sell parcels of land without review also contribute to the myriad problems arising from unregulated subdivision.

Opponents of subdivision reform wave the U.S. Constitution as they rail against government review of land divisions. Claiming that regulating subdivisions is an affront to private property rights, they do not seem to understand how unregulated development is jeopardizing the future of Montana. If we do not respond to changing times with more stringent controls on rural land development, the Montana we know and love may soon disappear.

Voting for subdivision reform will not take away our private property rights or stop us from selling our land. It will only allow local governments the right to review subdivisions in order to make sure growth is compatible with the needs and desires of the community. Voting for subdivision reform is absolutely necessary if we are to preserve the Last Best Place for future generations.

(continued)
Unregulated subdivision affects us all

The impacts of unregulated subdivision are enormous, and affect us all in one way or another. In the five fact sheets that follow, we will detail the specific ways in which unreviewed development is affecting Montana:

- Squeezing through the loopholes: explains loopholes in current state law and the magnitude of the problem
- Losing agricultural lands: describes the impact of unreviewed development on Montana's agricultural communities
- Overburdening county services: discusses the impact of unreviewed development on counties and reveals who pays for additional services demanded by subdivision residents
- Losing wildlife habitat: portrays the impacts of rural development on wildlife and how loss of habitat is affecting agricultural producers, hunters, home owners and counties
- Uncovering consumer pitfalls: describes the pitfalls of unreviewed development for unwary buyers

These fact sheets were produced as part of the Montana Audubon Council's Subdivision and Land Use Planning Project
January 1993
**Subdivision Facts # 2**

*Squeezing through the Loopholes*

The Montana Subdivision and Platting Act was enacted in 1973 to regulate the division of land in order to prevent overcrowding of land, lessen congestion on streets and highways, provide adequate amenities to citizens and to provide for development compatible with Montana’s natural resources. To achieve these goals, the law required that land subdivision be reviewed by local authorities according to a balanced set of criteria.

Unfortunately, three loopholes in the state law allow almost all land divisions to escape review:

1) Since the law defines a subdivision as any division of land that creates a parcel of less than 20 acres, land divisions that are 20 acres or larger are exempt from review.

2) The law exempts occasional land sales, allowing one sale of a division of land in any 12-month period.

3) The law also exempts family conveyances, in which land is divided for the purpose of gift or sale to an immediate family member.

The best way to illustrate how developers exploit these exemptions is to use a hypothetical example (see illustration below).

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**The Transformation of a 120-acre Parcel into an Unreviewed Subdivision with Nine Lots**

- **A** - Division using the 20 acre definition of subdivision.
- **B** - Division using the family conveyance exemption.
- **C** - Division using the occasional sale exemption.
Unregulated subdivision is running away with Montana

Let's imagine that a developer buys a 120-acre piece of property, and then divides it into six 20-acre parcels. This division of one 120-acre parcel into six smaller parcels is not reviewed because of the 20-acre loophole, which allows parcels of 20-acres or larger to bypass review.

Imagine then that one of the 20-acre parcels is purchased by a man who divides it in half and sells 10 acres to his son. This division is not reviewed due to the family conveyance exemption. If father and son then sell 5-acre parcels to raise money to build houses, this division is not reviewed due to the occasional sale exemption. The result is a de facto subdivision with nine lots where before there was only one.

To get a feel for the magnitude of unreviewed development, consider the following figures. Since the Montana Subdivision and Platting Act was passed, only 8% of the 108,425 acres subdivided in Gallatin County have been reviewed. That means that the majority of subdivisions, a whopping 92%, have occurred without comment from county authorities or local residents.

The same percentages hold true for Missoula County, where 92% of 123,369 acres subdivided since 1973 have bypassed the review process.

Twenty years ago, when the Montana Subdivision and Platting Act was passed, few people could envision the sweeping changes that Montana is facing today. Without subdivision reform, we will continue to lose big game winter ranges, wide open spaces and agricultural land. If that occurs, the Last Best Place will be no more.
Subdivision Facts # 3

Losing Agricultural Lands

A proud heritage

What would Montana be without ranching and farming? Living off the land has always been a time-honored tradition in this state. The agricultural life, although harsh and demanding, remains an integral part of our western heritage.

Unfortunately, the urbanization of Montana is transforming both our physical and cultural landscape. Speculation in 20-acre parcels is pushing up property values, which can drive an agricultural producer out of business or force them to sell their land rather than convey it to heirs due to high inheritance taxes.

As a person working the land watches the surrounding properties fall under the 20-acre scalpel, they may worry how the influx of outsiders will affect their way of life. Many of those moving into rural subdivisions are drawn to the country in hopes of escaping the crime, congestion and stresses of city living. Unfortunately, many are ignorant of rural ways and have a poor understanding of the realities of life in an agricultural community.

The high cost of weeds

Where there’s people, there’s roads. And where there’s roads, there’s weeds. Breaking up a ranch into 20-acre lots creates an extensive network for weed invasion. By spreading out rather than clustering development, the subdivision law’s 20-acre loophole has contributed to the serious problem of noxious weed growth.

The current annual loss to Montana from spotted knapweed, for example, is over $4.5 million. Leafy spurge causes an annual loss of $1.4 million in livestock forage. And the estimated statewide loss from range weeds is a staggering $48 million dollars a year.

People buying 20-acre parcels are not only ignorant of how they contribute to weed growth, they’re uninformed about what steps must be taken to control the problem. And as every farmer and rancher knows, it is virtually impossible to prevent the spread of weeds without cooperation from neighboring property owners. The state provides money from the Noxious Weed Trust Fund for weed cooperatives to grapple with localized weed problems. More and more of these grant moneys are now being used for the purpose of controlling weeds in rural subdivisions.

Home on the range

Montana is one of the last open range states, a place where cattle are free to roam wherever they please, unless fenced out by a landowner.

New residents of rural subdivisions can get angry when they find livestock in their yard or discover that the grass on their property has been torn up by their neighbor’s herd. They find it difficult to understand that in Montana, fence maintenance is the responsibility of the person who wants to keep the livestock out and not the farmer or rancher who owns the livestock.

When city meets country

Big city transplants often complain about noise and odors from farms. They get irritated by the moving of cattle and sheep across roads. They bring with them domesticated pets that harass or kill valuable livestock.

New rural residents also bring fences, closing off the open range that ranchers depend on. In Lewis and Clark County, for instance, irate subdivision residents successfully petitioned the county to create herd districts, compelling ranchers to fence in their livestock.

(continued)
One county says no to subdivision

Problems with trespass, livestock harassment, noxious weeds and threatened lawsuits against agricultural operators, created such a storm in Jefferson County that sixty-five ranchers got together and requested assistance from their county. In response to their concerns, local authorities instituted an emergency zoning ordinance restricting one non-farm or non-ranch home to every 640 acres. It also banned any further subdivision or residential development.

It is important to note, however, that the emergency zoning ordinance is only a temporary measure, one that can be used for a maximum of two years.

I've seen it happen too many times. When the 20-acre folks show up, it's the farmer that gets squeezed out of the picture.

—Terry Murphy, a rancher in Jefferson County

Our economic stronghold

Protecting Montana's ranches and farmland is not simply a matter of maintaining tradition, it's an absolute necessity for Montana's future economic well-being. If we don't act now to prevent the encroachment of rural subdivisions, more and more productive agricultural land will disappear.
Abundant wildlife is one of the Treasure State’s greatest natural resources. Unfortunately, as habitat continues to vanish under the pressure of excessive development, wildlife may soon become one of Montana’s lost treasures.

An invaluable asset to those of us who love the outdoors, Montana wildlife also contributes directly to the financial well-being of our state. In 1990, for instance, tourists spent $44,000,000 on wildlife watching; 70% of this dollar amount came from the nearly 300,000 nonresidents who visited our state primarily to view wild animals in their natural habitat.

What happens to big game and wildlife as their forage and cover are lost to subdivision? As road and home construction destroys habitat and native vegetation, animals are forced to search for food on adjoining lands. Since a high proportion of rural subdivision occurs in agricultural areas, displaced wildlife often wind up on nearby croplands, causing serious damage problems for farmers.

Twenty-acre development has had significant impacts on hunters, impacts that could permanently change how hunting is practiced in this state. Changes in hunting due to subdivision can best be summed up in the following ways:

Loss of winter range is occurring at an alarming rate as winter ranges for large, free-ranging animals such as deer and antelope are being broken up and fenced off. At the same time, wildlife corridors for seasonal migration are being blocked by roads and houses. The extensive subdivision of the Hensley Creek breaks northeast of Columbus, the Stillwater River breaks north of Absarokee and Skelly Gulch in Lewis and Clark County are just a few examples of the countless acres of big game winter range that have been lost to rural subdivisions.

Access to private property is becoming limited as open spaces continue to be divided up into residential homesites. Subdivision residents often close their property for hunting; even if they continue to permit hunting, getting permission for access to private land is more difficult when multiple land owners are involved.

Petitions to close hunting areas have increased as open range is converted to residential homesites; while the Montana Department of Fish, Wildlife & Parks (FWP) has refused to accommodate requests by residents of subdivisions outside Missoula and Helena to close hunting areas, they report that densely populated residential subdivisions are making it difficult for the agency to use hunting to regulate wildlife overpopulation.

For many people, a love of wildlife and a desire to be closer to nature is a key incentive for moving to rural subdivisions. Unfortunately, wild animals often turn out to be unruly neighbors.

Romantic visions of country living fade away as grizzly bears, skunks and raccoons overturn trash cans. And home owners who adore the idea of animals eating out of their hands are the first to call the game warden when expensive gardens, lawns and shrubs are ravaged by hungry deer and elk. There also have been an increased number of complaints of mountain lions entering residential subdivisions and attacking domestic pets.
The high cost of confrontation

According to the Montana Department of Fish, Wildlife and Parks (FWP), the number of human-wildlife conflicts has escalated dramatically with the rise of rural subdivision. In 1991, for example, the Missoula Region 2 office of FWP reported that residential home owners made 56 complaints against bears, 41 complaints against mountain lions, 17 complaints against white-tailed deer and 22 against elk.

The conflicts arising from these confrontations are more than nuisances, they are costly to the state. In the Kalispell area Region 1 office, for instance, expenditures on game damage operations have more than doubled since 1985.

The game damage fund, which is operated by FWP, was originally set up to reimburse farmers and ranchers for crop and fence damage caused by wildlife. The fund, which is supported by fees collected through the sale of hunting licenses, is being used less for its original intent and increasingly to respond to complaints from residents of rural subdivisions demanding that game wardens shoot, trap and relocate wildlife infringing on their property. Last year, for example, FWP’s Region 4 spent approximately $20,000 of their funds on agricultural damage and $10,000 addressing problems of nuisance wildlife on rural subdivisions.

Minimizing the impacts of development

To a certain degree, the impacts of land subdivision on wildlife are inevitable, since development always tends to occur in the same areas where wildlife live—rivers and streams, fertile valley bottoms and mountain foothills. The 20-acre loophole, however, accelerates the loss of habitat by spreading development out over larger areas of land. Eliminating the loophole will help assure the future of Montana’s.
Who’s responsible for future costs?

Only 10% of land subdivisions in Montana undergo review. That means 90% of the time, local governments do not get a chance to examine a developer’s plans to make sure that roads are designed to county standards, allowances have been made for utility easements and that soils can handle effluents from septic tanks. As a result, many examples exist of residents of unregulated subdivision getting into battles with county officials over the source of money necessary to rectify problems from bad development.

Poorly designed roads

Ask a county official what the biggest hassle of unreviewed development is and they’re sure to tell you poorly designed roads. Steep grades, sharp corners, narrow shoulders and potholes; these are the trademarks of roads in unreviewed subdivisions. Chancy in the best of times, they often become hazardous when the weather turns bad. And roads constructed for subdivisions often are not built to the standards necessary to accommodate high volume-traffic.

The high price of road maintenance

Who’s responsible for road maintenance in an unreviewed development? The developer may promise to maintain the roads, but forget that promise a few years later. Some developers form home owners associations, but there’s no guarantee that residents will continue to pay their fees.

When the residents of a subdivision get frustrated enough with road conditions, they demand that the local government correct the problem. If the county does take on the responsibility for fixing the problem, it usually means that they’re repairing the road with taxpayer money.

Gallatin County, for example, spent $150,000 to improve a 13-mile dirt road leading to several unreviewed developments after subdivision residents complained that the road could not be traveled safely year-round. The county is currently spending another $15,000 a year maintaining that road. Unfortunately, Gallatin County can expect similar problems in the near future. Presently, there are petitions for county maintenance on 170 miles of dirt roads where unreviewed development has occurred.

An unfair deed

Questions regarding road ownership also have arisen in many unregulated subdivisions, since developers occasionally build roads across private lands with no easements. Residents of an unreviewed development in Flathead County, for instance, discovered to their dismay that 600 feet of their roadway illegally crossed private land. In Yellowstone County, developers have deeded the road in some unreviewed subdivisions to the county in the hopes of transferring responsibility for maintenance.

An inequitable tax structure

Many people think that subdivisions generate money for the community by building a larger tax base. What they don’t realize is that breaking up farmland into 20-acre parcels places enormous demands on county services, without an equitable distribution of tax burden.

Road maintenance is only the most visible demand made by subdivision residents. They often want fire protection, police protection, school bus service and other public amenities. Unfortunately, owners of the 20-acre parcels aren’t paying their fair share of taxes.
Subdivision parcels are taxed as agricultural land which yields considerably less revenue than residential land. In Missoula County, for instance, a 20-acre parcel would pay about $10 a year in taxes. The same parcel if only an acre smaller would pay approximately $300 in taxes. In addition, improvements on agricultural land, such as home or garage construction, are only taxed at 80% of market value. To understand how this can impact an entire county, consider this: In Park County there are 1,560 twenty-acre tracts that contribute $9,500 to the tax base. If they were taxed as residential tracts they would contribute over $300,000.

You'll notice that Montana taxes are real low. We consider this one of the last great bargains and quite frankly don't expect it to last forever. Rather than reflecting the value of the land, it really reflects the current political climate in Montana. Because twenty acres is not considered a subdivision, it is taxed at agricultural rates, which currently are in the neighborhood of $10 to $20 per year for 20 acres.

—From a brochure selling 20-acre ranchettes to out-of-state residents.
Uncovering Consumer Pitfalls

Let the buyer beware

Considering all the loopholes in the state's subdivision law, "Let the buyer beware" could become our new state motto.

Buyers are purchasing properties in Montana that have no utility easements, drinking water or building sites. While these amenities are not required in unreviewed subdivisions, many people assume these services are included in their purchase.

Without subdivision review there is also no sure way for a buyer to discover the hidden defects that a property might contain, such as steep slopes, unstable soils or inadequate access for emergency vehicles. As a consequence, many people have purchased property in Montana to later discover that home construction was prohibitively expensive or in some cases impossible.

You can buy, but you can't build

Purchasers of unregulated subdivision often fail to consider the cost of buying easements or installing basic services.

It can cost as much as $50,000 to construct a mile-long, 20-foot-wide, two-lane gravel road. Extending phone cable from existing service to a home site can be as much as $1,000 per mile. The costs of installing a well is especially tricky to calculate since most buyers do not know the depth of their water table. Because contractors charge for drilling by the foot, a landowner could spend as little as $4,000 or as much as $20,000 on installing a well.

In the Flathead area, one developer has created several 20-acre parcels within the 100-year floodplain of the Flathead River. Montana law prohibits any new construction within floodplains, but because this is an unreviewed land division, the buyer may not learn of that fact until being denied a building permit.

Headaches like these are generally the problem of the purchaser. But increasingly, rate landowners are pressuring counties to rectify problems resulting from their own ignorance. (For further information, see fact sheet entitled "Overburdening of County Services").

Where's the fire?

Rural firefighters and emergency medical technicians around the state have complained about roads in unreviewed subdivisions that are too steep, too narrow or just too dangerous to accommodate emergency vehicles. They have also encountered roads with no names or signs which makes responding to an emergency call in a timely fashion almost impossible.

Roads built in unreviewed subdivisions, hastily constructed by developers, often do not meet county standards. This problem has become so pervasive that some banks have begun to require that landowners have access to a county-maintained road or some form of maintenance agreement before loaning money for residential construction.

(continued)
Developing without consideration for the fire hazard in an area jeopardizes the lives of both residents and firefighters.
—Sonny Stiger, Chairman of the Tri-County Wildland/Urban Interface Fire Working Group

**Fishing for trouble**

How many people would think to ask whether their property was situated next to a hazardous waste site?

One woman bought a recreational homesite in an unregulated subdivision on Silver Bow Creek after the developer told her that her sons would enjoy fly fishing in the creek. She later received a letter from the Environmental Protection Agency informing her that her property was located near a Superfund site. The developer had failed to tell her that the creek on her property was contaminated with heavy metals and hadn't had fish in it for years.

**Better pay now than later**

Opponents of subdivision reform claim that regulation will stifle growth by adding costs to the development process. But costs like these are traditionally passed on to the buyer who benefits greatly from review. Regulating subdivisions will help assure that consumers know what they are paying for — so that taxpayers don't get saddled with the unexpected costs of poor development.
Hold the line on unregulated subdivisions, vote yes on subdivision reform.